TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 702.

THE POSTAL TELEGRAPH CABLE COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF ALABAMA.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA.

FILED MAY 9, 1894.

(51,586.)

(51,586.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 702.

THE POSTAL TELEGRAPH CABLE COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF ALABAMA.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA.

INDEX.

	Original.	Print.
Writ of error	*a*	1
Caption	1	1
Transcript from State court	1	2
Petition for removal	1	2
Bond for removal	4	5
Order for removal	9	9
Summons	10	9
Complaint	10	10
Clerk's certificate	12	11
Judge's certificate	12	11
Answer	13	12
Order granting leave to file amended complaint	20	17
Amended complaint	20	18
Answer to amended complaint	22	19
Agreed statement of facts	30	25
Order beginning hearing	35	29

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 18, 1894.

	Original.	Print.
Order taking cause under advisement	35	29
Judgment	35	29
Opinion	36	30
Petition for writ of error	42	35
Exhibit A—Act to amend subdivision 6 of section 454 of the Code of Alabama	48	40
Assignment of errors	49	41
Exhibit A—Act to amend subdivision 6 of section 454 of the Code of Alabama	54	45
Order allowing writ of error	55	46
Copy of writ of error	56	46
Bond on writ of error	57	47
Copy of citation	59	49
Clerk's certificate	60	50

a UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the middle district of Alabama, Greeting:

Whereas in the record and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court of the United States for the middle district of Alabama, before you or some of you, between The State of Alabama, plaintiff, and The Postal Telegraph Cable Company, defendant, wherein was drawn in question the validity of a statute of the General Assembly of Alabama on the ground of its being repugnant to the Constitution of the United States and also title 65 of the Revised Statutes of the United States and the decision was in favor of its validity, a manifest error hath happened, to the great damage of the said Postal Telegraph Cable Company, as by its said complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the said parties in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the — day of May, A. D. 1894, in the said Supreme Court to be then and there held, that, the record of proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of
b the said Supreme Court, this 26th day of April, in the year of our Lord 1894.

(Seal of the United States Circuit Court,)
(Middle District of Alabama.)

J. W. DIMMICK,
Clerk of the Circuit Court of the United States for the Middle District of Alabama.

Allowed by—
JOHN BRUCE,
United States Judge for the Middle District of Alabama.

c [Endorsed:] In the Supreme Court of the United States. The Postal Telegraph Cable Company, plaintiff in error, *vs.* The State of Alabama, defendant in error. Writ of error. Filed April 26, 94. J. W. Dimmick, clerk.

1 November term, 1893.

At a circuit court of the United States for the middle district of Alabama, in the fifth judicial circuit, begun and held at Montgomery, Alabama, on the first Monday in November, it being the sixth day

of said month, in the year of our Lord one thousand eight hundred and ninety-three—present and presiding, the Honorable John Bruce, judge of the district courts of the United States for the middle and northern districts of Alabama, sitting as circuit judge—Thursday, March 1st, 1894, a day of said term, the following proceedings were had:

Transcript from Circuit Court of Montgomery County.

* * * * * * *

THE STATE OF ALABAMA
vs.
THE POSTAL TELEGRAPH CABLE CO. } No. 741.

STATE OF ALABAMA:

In the Circuit Court of Montgomery County, January Term, 1893.

THE STATE OF ALABAMA, Plaintiff,
vs.
POSTAL TELEGRAPH CABLE COMPANY, Defendant. }

Petition to remove suit to the circuit court of the United States for the middle district of Alabama.

To the honorable the circuit court of the second judicial circuit of the State of Alabama within and for Montgomery county:

The petition of The Postal Telegraph Cable Company, the defendant in abovesentitled action, respectfully shows:

I. That it, The Postal Telegraph Cable Company, is a corporation organized under the laws of the State of New York in the year 1886 for the purpose of constructing, owning, using, and operating electric telegraph lines within the State of New York and extending beyond the limits of said State into and across other States and Territories for the purpose of commercial and interstate communication by telegraph lines for general public use.

That said corporation has its principal executive, financial, and accounting offices in the city of New York.

That at all the times hereinafter mentioned said corporation was and still is engaged in the general telegraph business of receiving and sending telegrams over its lines for commercial purposes for the public between citizens within the State of New York and other States and across the same to and from other places within other States, and also in sending messages by telegraphic communication between the several departments of the Government of the United States and their officers and agents at a rate of charges designated and prescribed by the Postmaster General of the United States under the laws of Congress.

That on or about the 6th day of March, 1886, said corporation accepted the provisions of the act of Congress of July 24th, 1866 (now title 65 of U. S. Revised Statutes), relating to the occupancy of the post-roads of the United States by telegraphic lines, and that in

pursuance thereof the Postmaster General of the United States has annually from time to time designated said corporation as one of the telegraph companies that must transmit Government messages for the United States at a price and rate fixed by the Postmaster General, giving said messages a preference over all other messages.

That most of the lines of said corporation are upon the post-roads of the United States; and your petitioner further represents that it is now and was during all the times hereinafter mentioned a citizen and resident of the said State of New York.

II. That on or about the first day of November, 1892, the above-entitled action was commenced in this honorable court by the service of the summons and complaint therein upon the agent of the said defendant at the city of Montgomery, in the said State of Alabama, all of which will more fully appear by reference to said summons and complaint as the same is on record in this court.

III. That the said action is a suit of the civil nature at common law in which the matter in dispute and the interests involved exceed, exclusive of the interests and costs, the sum or value of two thousand dollars, and that the controversy therein arises under the Constitution and laws of the United States and laws of the State of Alabama and is wholly between citizens of different States, to wit, between your said petitioner, who avers that it was at the time of the bringing of this suit and still is a citizen and resident of the said State of New York, and the said plaintiff, the said State of Alabama, who (your petitioner avers) was then and still is a citizen and resident of the State of Alabama.

IV. And your petitioner offers herewith a bond, with good
3 and sufficient surety, for its entering in said circuit court of the United States for the district of Alabama, on the first day of its next session, a copy of the record in this suit and for paying all costs that may be awarded by said circuit court if said court shall hold that this suit was wrongfully or improperly removed thereto.

V. That by the act of Congress entitled "An act to amend the act of Congress approved March third, eighteen hundred and seventy-five, entitled An act to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from State courts, and for other purposes, and to further regulate the jurisdiction of circuit courts of the United States, and for other purposes," approved March 3rd, 1887, as amended by an act entitled "An act to correct the enrollment of an act approved March third, eighteen hundred and eighty-seven, entitled "An act to amend sections one, two, three, and ten of an act to determine the jurisdiction of the circuit courts of the United States and to regulate the removal of causes from the State courts, and for other purposes, approved March 3rd, 1873," approved August 13th, 1888, it is the duty of this honorable court to accept this petition and the said bond and to proceed no further in said action.

Wherefore your petitioner prays this honorable court to proceed no further herein except to make an order for the removal of this cause to said circuit court of the United States for the district of

Alabama and to accept the said surety and bond and to cause the record herein to be removed into the said circuit court of the United States in and for the district of Alabama; and it will ever pray.

POSTAL TELEGRAPH CABLE COMPANY,
By WM. H. BAKER, *Vice-pres't.*
MORDECAI & GADSDEN,
Attorneys for Petitioner.

STATE OF NEW YORK, }
City and County of New York, } *ss:*

Personally appeared before me William H. Baker, who, being duly sworn, says that he is the vice-president of The Postal Telegraph Cable Company, defendant herein, said petitioner being a body corporate under the laws of the State of New York; that he has read the foregoing petition and knows the contents thereof, and that the statements and allegations therein contained are true of his own knowledge.

WM. H. BAKER.

Sworn to and subscribed before me this 14th day of December, 1892.

THEODORE L. CUYLER, JR.,
[SEAL.] *Notary Public, Kings County.*

Cert. filed in N. Y. county.

The foregoing petition was presented to the court this 22 day of December, 1892.

J. R. TYSON,
Judge of 2nd Judicial Circuit.

STATE OF NEW YORK, }
City and County of New York, }

I, William J. McKenna, clerk of the city and county of New York and also clerk of the supreme court for the said city and county, the same being a court of record, do hereby certify that Theodore L. Cuyler, Jr., has filed in the clerk's office of the county of New York a certified copy of his appointment as notary public for the county of Kings, with his autograph signature, and was at the time of taking the proof of acknowledgment of the annexed instrument duly authorized to take the same; and, further, that I am well acquainted with the handwriting of such notary and verily believe the signature to the said certificate of proof of acknowledgment to be genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court and county the 14 day of Dec., 1892.

W. J. McKENNA, *Clerk.*

STATE OF ALABAMA, }
County of Montgomery, } ss:

In the Circuit Court Thereof, Second Judicial Circuit.

THE STATE OF ALABAMA, Plaintiff, }
vs.
POSTAL TELEGRAPH CABLE COMPANY, Defendant. }

Know all men by these presents that we, The Postal Telegraph Cable Company, the defendant in the above-entitled action, as principal, and Charles Turner and A. Ladady, as sureties, are held and firmly bound unto The State of Alabama, the plaintiff in the above-entitled action, in the penal sum of one thousand dollars ($1,000.00); for the payment of which, well and truly to be made, we bind ourselves and each and every of our successors, heirs, executors, and administrators, jointly and severally, firmly
5 by these presents.

In witness whereof the said Postal Telegraph Cable Company has caused these presents to be signed by its vice-president and the corporate seal attached, and the said Charles Turner and A. Latady have hereunto set their hands and seals this 14th day of December, A. D. 1892.

The condition of the above obligation is such that whereas the said Postal Telegraph Cable Company does herewith file in the circuit court of the second judicial circuit of the State of Alabama within and for the county of Montgomery a petition for the removal of the above-entitled action or suit, wherein the said State of Alabama is plaintiff and the said Postal Telegraph Cable Company is defendant, from said circuit court of the second judicial circuit of the State of Alabama within and for Montgomery county to the circuit court of the United States for the district of Alabama:

Now, therefore, the condition of the above obligation is such that if the above-bounden the Postal Telegraph Cable Company shall and do well and truly enter or cause to be entered in the said circuit court of the United States for the district of Alabama, on or before the first day of its next session, a copy of the record in said action or suit and shall and do well and truly pay or cause to be paid all costs that may be awarded by the said circuit court of the United States if said court shall hold that said action or suit was wrongfully or improperly removed hereto, then this bond or obligation to be void and of no effect; otherwise to be and to remain in full force, effect, and virtue.

POSTAL TELEGRAPH CABLE COMPANY,
By WM. H. BAKER, *Vice-pres't.* [SEAL.]

Attest: J. O. STEVENS.

[Corporate Seal.]

CHAS. TURNER. [SEAL.]
A. LATADY. [SEAL.]

Signed, sealed, and delivered in presence of—
R. S. GERNSEY.
JOHN DORAN.
CHAS. A. GARLAND.
CHAS. C. GRAVES.

6 STATE OF NEW YORK, }
City and County of New York, }

On this the 14th day of December, 1892, before me, Theodore L. Cuyler, Jr., a notary public within and for the county and State aforesaid, personally appeared Wm. H. Baker, known to me to be vice-president of the Postal Telegraph Cable Company, and acknowledged to me that he executed the foregoing instrument on behalf of the said Postal Telegraph Cable Company and caused the corporate seal of said company to be thereto attached.

In witness whereof I have hereunto set my hand and affixed my notary seal the day and year above written.

THEODORE L. CUYLER, Jr.,
[SEAL.] *Notary Public, Kings Co.*

Certif. filed in N. Y. Co.

STATE OF NEW YORK, }
City and County of New York, }

I, William J. McKenna, clerk of the city and county of New York and also clerk of the supreme court for the said city and county, the same being a court of record, do hereby certify that Theodore L. Cuyler, Jr., has filed in the clerk's office of the county of New York a certified copy of his appointment as notary public for the county of Kings, with his autograph signature, and was at the time of taking the proof or acknowledgment of the annexed instrument duly authorized to take the same; and, further, that I am well acquainted with the handwriting of such notary and verily believe the signature to the said certificate of proof of acknowledgment to be genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court and county the 14th day of December, 1892.

WM. J. McKENNA, *Clerk.*

STATE OF NEW YORK, }
City and County of New York, } ss.:

I, Theodore L. Cuyler, Jr., notary public in and for the State, city, and county of New York, do hereby certify that R. L. Gernsey, a subscribing witness to the foregoing instrument, known to me, appeared before me this day and, being sworn, stated that Wm. H. Baker, as vice-president of the Postal Telegraph Cable Company, voluntarily executed the same in his presence and in the presence of the other subscribing witness on the day the same bears date,

and in their presence caused the corporate seal of the said corporation to be thereto attached, and that such other witness sub-
7 scribed his name as witness in his presence.

Given under my hand and seal of office this 14th day of December, 1892.

THEODORE L. CUYLER, JR.,
[SEAL.] *Notary Public, Kings County.*

Cert. filed in N. Y. Co.

STATE OF NEW YORK, }
City and County of New York, }

I, William J. McKenna, clerk of the city and county of New York and also clerk of the supreme court for the said city and county, the same being a court of record, do hereby certify that Theodore L. Cuyler, Jr., has filed in the clerk's office of the county of New York a certified copy of his appointment as notary public for the county of Kings, with his autograph signature, and was at the time of taking the proof or acknowledgment of the annexed instrument duly authorized to take the same; and, further, that I am well acquainted with the handwriting of such notary and verily believe the signature to the said certificate of proof of acknowledgment to be genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court and county the 14 day of Dec., 1892.

WM. J. McKENNA, *Clerk.*

STATE OF ALABAMA, }
County of Jefferson, } *ss:*

I, J. K. Brockman, a notary public in and for said Co., hereby certify that Charles Garland, a subscribing witness to the foregoing instrument of writing, known to me, appeared before me this day and, being sworn, stated that Charles Turner and A. Latady, parties to the foregoing instrument of writing, voluntarily executed the same in his presence and in the presence of the other subscribing witnesses on the 19th day of December; that he attested the same in the presence of the said Charles Turner and A. Latady and the other witnesses, and that such other witnesses subscribed *his* name as a witness in his presence.

Given under my hand and seal this 19th day of December, 1892.

[NOTARIAL SEAL.] J. K. BROCKMAN,
Notary Public.

8 STATE OF ALABAMA, }
County of Jefferson, } *ss:*

I, J. A. Brockman, a notary public in and for said Co., hereby certify that Charles Turner and A. Latady, whose names are signed to the foregoing instrument of writing and who are known to me, acknowledged before me this day that, being informed of the con-

tents of said instrument of writing, they executed the same voluntarily on the 19th day of December, 1892.

Given under my hand and seal this 19th day of Dec., A. D. 1892.

J. K. BROCKMAN,
Notary Public.

[SEAL.]

STATE OF ALABAMA, }
County of Jefferson, } ss:

Charles Turner, being duly sworn, deposes and says that he is one of the sureties named in the foregoing undertaking; that he is a resident and freeholder in the State of Alabama, and that he is worth the sum of one thousand dollars over and above all of his liabilities and exemptions within the State of Alabama not by law exempt from execution.

CHAS. TURNER.

Sworn to and subscribed before me this 19th day of December, 1892.

J. K. BROCKMAN,
Notary Public.

[SEAL.]

STATE OF ALABAMA, }
County of Jefferson, } ss:

A. Latady, being duly sworn, deposes and says that he is one of the sureties named in the foregoing undertaking; that he is a resident and freeholder in the State of Alabama, and that he is worth the sum of one thousand dollars over and above all of his liabilities and exemptions in property within the State of Alabama not by law exempt from execution.

A. LATADY.

Sworn to and subscribed before me this 19th day of December, 1892.

J. K. BROCKMAN,
Notary Public.

[SEAL.]

9 STATE OF ALABAMA, }
County of Montgomery, } ss:

I hereby approve the foregoing bond and the sureties thereto as good and sufficient.

J. R. TYSON,
Judge of the Circuit Court of the Second Judicial Circuit of the State of Alabama within and for Montgomery Co.

STATE OF ALABAMA, } ss:
County of Montgomery, }

In the Circuit Court, Second Judicial Circuit.

THE STATE OF ALABAMA, Plaintiff, }
vs.
POSTAL TELEGRAPH CABLE COMPANY, Defendant. }

The above-entitled action coming on for hearing upon the petition of the defendant, Postal Telegraph Cable Company, for an order removing said cause to the circuit court of the United States for the district of Alabama, and it appearing to the court that said action is a suit or action of a civil nature at common law wherein the matter in dispute and the interest involved exceed, exclusive of interest and costs, the sum of value of two thousand dollars, and that the controversy arises under the Constitution and laws of the United States and laws of the State of Alabama and is between citizens of different States; and it further appearing to the court that the time has not expired wherein *which* said defendant is required by the laws of the State of Alabama to *to* answer or plead to the complaint herein; and it further appearing to the court that the said defendant has made and filed a petition in this court for the removal of said action to the circuit court of the United States for the district of Alabama, and that said defendant has made and filed with such petition a bond, with good and sufficient surety, for its entering in said circuit court of the United States for the district of Alabama on the first day of its next session a copy of the record in said action and for paying all costs that may be awarded by the said circuit court of the United States for the district of Alabama if the court shall hold that such suit or action was wrongfully or improperly removed thereto;

10 Now, on motion of Messrs. Mordecai & Gadsden, attorneys for the said petitioner, the said Postal Telegraph Cable Company—

It is hereby ordered that said action be, and is hereby, removed to the circuit court of the United States for the district of Alabama, as prayed in said petition.

Dated at Montgomery, in said county and State, this 22nd day of December, A. D. 1892.

J. R. TYSON,
Judge of 2nd Judicial Circuit.

THE STATE OF ALABAMA, }
Montgomery County. }

To any sheriff of the State of Alabama, Greeting:

You are hereby commanded to summon Postal Telegraph Cable Company, a corporation, to appear at the next term of the circuit court to be held for said county, at the place of holding the same, then and there to answer the complaint of the State of Alabama.

Witness my hand this the 1st day of November, 1892.

E. R. HOLT, *Clerk.*

Complaint.

In the Circuit Court of Montgomery County, Alabama, January Term, 1893.

THE STATE OF ALABAMA, Plaintiff,
vs.
POSTAL TELEGRAPH CABLE COMPANY, Defendant.

The plaintiff, The State of Alabama, claims of the defendant, Postal Telegraph Cable Company, a foreign corporation, the sum of fifteen hundred dollars, for that whereas heretofore, to wit, on the first day of January, 1890, and for more than sixty days thereafter the defendant did engage in the business of a telegraph company between points wholly within the State of Alabama and did run and operate its lines on or along two hundred and fifty miles of railroad track within the State of Alabama, whereby it became and was the duty of the defendant to pay in advance on the first day of January, 1890, to the auditor of the State of Alabama, a privilege tax of five hundred dollars, together with the further sum of one dollar for each mile of railroad track on or along which the lines of the defendant as such telegraph company did operate
11 or extend, and at the same time to report under oath the mileage of railroad track operated by it within the State of Alabama; and plaintiff avers that the defendant made default in the payment of said tax and in the making of said report for more than sixty days, whereby it became and was and is liable to pay to the plaintiff a penalty in double the amount of said tax—that is to say, a penalty of fifteen hundred dollars—for which plaintiff here sues.

And the plaintiff claims of the said defendant the further and additional sum of fifteen hundred dollars, for that whereas heretofore, to wit, on the first of January, 1891, and for more than sixty days thereafter, the defendant did engage in the business of a telegraph company between points wholly within the State of Alabama and did run and operate its lines on or along two hundred and fifty miles of railroad track within the State of Alabama, whereby it became and was the duty of the defendant to pay in advance, on the first day of January, 1891, to the auditor of the State of Alabama a privilege tax of five hundred dollars, together with the further sum of one dollar for each mile of railroad track on or along which the lines of the defendant as such telegraph company did operate or extend, and at the same time to report under oath the mileage of railroad track operated by it within the State of Alabama, and plaintiff avers that the defendant made default in the payment of said tax and in the making of said report for more than sixty days, whereby it became and was and is liable to pay to the plaintiff a penalty in double the amount of said tax—that is to say, a penalty of fifteen hundred dollars—for which plaintiff here sues.

And the said plaintiff claims of the said defendant the further and additional sum of sixteen hundred and fifty-six dollars, for that whereas heretofore, to wit, on the first day of January, 1892, and for more than sixty days thereafter, the defendant did engage in the business of a telegraph company between points wholly within the State of Alabama and did run and operate its lines on or along three hundred and twenty-eight miles of railroad track within the State of Alabama, whereby it became and was the duty of the defendant to pay in advance, on the first day of January, 1892, to the auditor of the State of Alabama a privilege tax of five hundred dollars, together with the further sum of one dollar
12 for each mile of railroad track on or along which the lines of the defendant as such telegraph company did operate or extend and at the same time to report under oath the mileage of railroad operated by it within the State of Alabama, and plaintiff avers that the defendant made default in the payment of said tax and in the making of said report for more than sixty days, whereby it became and was and is liable to pay to the plaintiff a penalty of double the amount of said tax—that is to say, a penalty of sixteen hundred and fifty-six dollars—for which plaintiff here sues.

WILLIAM L. MARTIN,
Attorney General of Alabama.

Executed service by leaving copy of within summons and complaint with C. A. Garland, general manager of Postal Tel. Co.

GEO. M. MORROW, *Sheriff*,
J. B. MARSHALL, *D. S.*

Nov. 4, '92.

THE STATE OF ALABAMA, }
Montgomery County. }

I, W. J. Booth, clerk of the circuit court in and for Montgomery county, in the 2nd judicial circuit of said State, do hereby certify that the foregoing pages, numbered from one to seventeen, both inclusive, contain a full, true, correct, and complete transcript of all the papers, orders, and proceedings in the case of The State of Alabama *versus* The Postal Telegraph Cable Company as the same appears of record and on file in said court.

In testimony whereof I have hereunto set my hand and caused the seal of said court to be affixed this 31st day of December, 1892.

[SEAL.] W. J. BOOTH,
Clerk of Circuit Court, Montgomery County, Ala.

THE STATE OF ALABAMA, }
Montgomery County. }

I, John R. Tyson, do hereby certify that I am the judge of the second judicial circuit of the State of Alabama and the presiding judge of the circuit court in and for the county of Montgomery, in said State; and I further certify that the above and within-named W. J. Boothe is the clerk of said court for the county of Montgom-

ery, and that the attestation of said clerk to his certificate to the above and within transcript, numbered from one to seventeen, both inclusive, is in due form.

Given under my hand, at the city of Montgomery, State of Alabama, on this the 7th day of January, 1893.

J. R. TYSON,
Judge of the 2nd Judicial Circuit of the State of Alabama.

Filed the 11th day of January, A. D. 1893.
J. W. DIMMICK, *Clerk.*

13 *Answer of Defendant.*

UNITED STATES OF AMERICA, }
District of Alabama. }

In the Circuit Court, Fifth Circuit.

THE STATE OF ALABAMA, Plaintiff, }
vs.
THE POSTAL TELEGRAPH CABLE COMPANY, Defendant. }

The defendant, The Postal Telegraph Cable Company, answering the complaint of the plaintiff herein, The State of Alabama, says:

I. That it denies each and every allegation therein contained not hereinafter specifically admitted.

II. That this defendant admits and alleges that it is a telegraph company duly incorporated and organized under the laws of the State of New York, and was, on the first days of January, 1890, 1891, and 1892, respectively, engaged in and still continues to carry on the business of a telegraph company, having offices in various cities and towns in the State of Alabama for the purpose of receiving and sending telegraphic messages and maintaining and operating certain lines of telegraph on the various post-roads, public roads, and railroads extending over, across, leading into and from the State of Alabama to the State of Mississippi and other points in other States in the United States and in the Dominion of Canada, and that by its charter it is authorized to construct, maintain, and operate lines of telegraph in and between the various States of the Union, including the State of Alabama.

III. That this defendant is also lessee of the Atlantic Postal Telegraphic Cable Company, which was prior to the said 1st day of January, 1890, and still is a telegraphic company duly incorporated and organized under the laws of the State of New York and by its charter authorized to lease, construct, maintain, and operate lines of telegraph in and between the various States of the Union and also including the State of Alabama, and that this defendant is also the lessee or owner of many other telegraph lines that run in, through, and over most of the States and Territories of the United States, including the States of North Carolina, South Carolina, Georgia, Alabama, Mississippi, Louisiana, New York, New Jersey, Pennsyl-

vania, Maryland, District of Columbia, and many of the Western States, and that, as such lessee and owner, this defendant is
14 engaged in the general public telegraph business of transmitting messages for commercial purposes by, along, and over its lines in, from, through, and across the State of Alabama and many other States and Territories of the Union, and has offices for the receiving and sending of messages by telegraph in each and every State and Territory wherein the lines owned or leased by it extend, and has offices in various cities and towns in the State of Alabama for the general purposes of its business, from which its poles and wires run and extend over the public highways, post-roads, and public roads throughout the State of Alabama across and into the States of Georgia and Mississippi respectively, and also extending and passing therefrom into other adjoining States of the Union at different points.

IV. That on or about the 6th day of March, 1886, this defendant, the said The Postal Telegraph Cable Company, duly filed its written acceptance with the Postmaster General of the United States of the restrictions and obligations of the act of Congress entitled "An act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military, and other purposes," approved July 24th, 1866, now title 65 of the United States Revised Statutes, relating to the occupancy of post-roads of the United States by telegraph lines, and that in pursuance thereof the Postmaster General had, at the times hereinafter stated, designated this defendant as one of the telegraph companies that must transmit telegraph messages for the United States at a price and rate fixed by the said Postmaster General, which said designation is still of force, and this defendant is still engaged as a governmental agent of the United States, and was, at the times hereinafter mentioned, so engaged in transmitting messages for the Government of the United States between its various offices, not only from points within the States of Alabama to points without the State of Alabama, but also for such governmental officers from points wholly within the State of Alabama to other points also wholly within the said State.

V. That this defendant, proceeding thereunder, did construct and now has in operation its lines on the various public roads and post-roads of the United States within the States of Alabama and in all of the States and Territories into which its lines extend, and in accordance with the authority of said charter and said act of Con-
15 gress and at the present time, as well as at the times hereinbefore and hereinafter referred to, was and still is maintaining and operating said lines of telegraph on the various highways and post-roads as aforesaid leading into, over, through, and across the said State of Alabama to the State of Georgia, as well as to the State of Mississippi, and passing into, by continuous lines, many other States and Territories of the United States, including North Carolina, South Carolina, Virginia, Louisiana, District of Columbia, Maryland, Delaware, and Pennsylvania, New York, New Jersey, Massachusetts, and other States of the Union.

VI. That the said telegraph lines so running into and through the said State of Alabama connect with and extend beyond the termini of said railroads and post-roads and other highways, such post-roads and rivers making continuous lines of telegraph from the offices of the said company to the various cities and towns in the said State of Alabama, to, through, and over many of the principal railroads, highways, post-roads, and military roads in and of the United States, having offices for the transaction of telegraphic business in the various departments of the Government at Washington, in the District of Columbia, and in nearly all of the principal cities, towns, and villages of the United States and Territories thereof.

VII. That all of the said railroads and highways so leading into and through the said State of Alabama, as well as in the United States, are public highways, and that the mails of the United States are regularly carried thereon and delivered therefrom under the authority and direction of the Postmaster General, and that the said railroads and highways and each of them, as well as the public roads in the State of Alabama through which said lines of telegraph run, are post-roads of the United States.

VIII. That said telegraph lines are also constructed over, under, and across the navigable streams of the United States in the State of Alabama and in the other States of the Union, but in all cases such lines are so constructed and maintained so as not to obstruct the navigation of said streams and the ordinary travel on said military and post roads.

IX. That said telegraph company was before and during the years commencing respectively the first day of January, 1890, the first day of January, 1891, and the first day of January, 1892, and now is engaged in the business of receiving and sending telegrams over said lines for the public between its said offices in the State of Alabama and other places in other States and Territories of the
16 United States and to and from foreign countries, and also in sending telegraphic communications between the several departments of the Government of the United States and their officers and agents, giving priority to said official telegraphic communications over all other business; and this defendant alleges—

That said official telegraphic messages have been and are sent at rates which have been fixed by the Postmaster General annually since the 6th day of March, 1886.

X. And this defendant further alleges that by its name and by virtue of the act of incorporation and subject to the Constitution and statute laws of the United States it was on and previous to the first days of January, 1890, 1891, and 1892, respectively, and still is engaged in said telegraph business for the purpose of interstate commerce and as a governmental agent of the United States of America, operating its lines of telegraph in, upon, and along the post-roads of the United States in, through, and over the public highways of the United States within the State of Alabama, both from its offices within the State of Alabama to those without the said State of Alabama, as hereinbefore set forth, as well as to its offices also within

the State of Alabama, as such governmental agent of the United States.

XI. That, being so engaged in the business of transmitting telegraphic messages for the purpose of interstate commerce and as a governmental agent of the United States of America on and previous to the times hereinafter mentioned, as well as now, and having for said purpose offices within the State of Alabama, this defendant alleges that it is not subject or liable to the provisions of an act of the General Assembly of the State of Alabama entitled "An act to amend subdivision 6 of section 454 of the Code," approved February 28th, 1889; and for a further defense this defendant says:

XII. That the said act of the General Assembly of the State of Alabama under which it is sought to hold this defendant liable, as alleged in said complaint, is in contravention to and in violation of the provisions of section 5253 of the Revised Statutes of the United States and also the Constitution of the United States, as well as the provisions of article XI of the constitution of the State of Alabama, and is "*ultra vires*" and void.

XIII. And for a further affirmative defense this defendant alleges—

That its various offices within the State of Alabama are merely initial points for sending telegraphic messages elsewhere and
17 terminal points for receiving such messages, but that the sending, receiving, and carrying of such messages is a continuous and complete transaction, extending almost simultaneously along its different entire lines and routes from the several various offices within the said State of Alabama to and from different points within and without the State of Alabama, as hereinbefore alleged.

XIV. That under and by virtue of article XI of the constitution of the State of Alabama all property must be assessed and taxed according to its value for purposes of revenue.

That no law can be passed that will levy a tax of more that ¾ of 1% upon the value of property taxed.

That no county can levy more than one-half of 1 % upon the value of taxable property.

That corporations can only be taxed in the same manner, form, and extent as individuals.

Defendant further says that it is taxes upon all its property in Alabama according to its assessed value, in manner and form pursuant to section 504 of the Code of Alabama.

This defendant also says that under the provisions of the laws of the State of Alabama it is subject to the laws of the said State which require the annual payment of specific license fees and charges in cities and towns for the privilege of doing its business therein, in addition to tax upon property, and also a tax upon its gross receipts; that said license charges and fees often exceed more than 10% of the value of the property of defendant located within the limits of such city and town in the State of Alabama.

Defendant further says that this action is brought to recover a privilege or license tax imposed for the purpose of revenue, in addition to the taxation upon the value of the property of defend-

ant and in addition to local license charges and fees annually imposed by cities and towns upon defendant for the purpose of revenue.

This defendant admits that it did not make the report of its miles of wire or pay the tax in the declaration mentioned; that said report was for the purpose of imposing upon and exacting an illegal and unconstitutional tax from defendant, and was for no other purpose or object, and is void, and defendant cannot be made liable for any penalty for said neglect.

18 That said sum claimed as a State privilege tax is in addition to all other annual taxes and license charges imposed upon the defendants and will greatly exceed the sum of three-fourths of one per cent. upon the value of the property of defendant in the State of Alabama.

That the property of the like nature of defendant which *are* used by domestic corporations in the State of Alabama *are* not taxed or assessed or charged by law for privileges in the manner or form or nature or extent as is this defendant, as in the complaint mentioned.

That there are a large number of miles of wire similar to those of defendant *and* are used as electrical conductors for telephone and electric light and electric power purposes within the State of Alabama, and that the same are not taxed or assessed or charged by law for privileges in the manner or form or nature or extent as *is* this defendant, as set forth in the complaint.

That said taxes in the complaint mentioned are not imposed upon the defendant or its property or business in the same manner or form or nature as are taxes imposed or required to be paid by individuals upon property or business in the State of Alabama.

That the telegraph wires used by the defendant in the complaint mentioned do not exceed in value the sum of fifteen dollars per mile for each mile thereof, and that property of like nature and use belonging to other corporations in the State of Alabama is of much more value than is that of defendant, and yet it is assessed and taxed to the extent only and in the manner and amount as is that in use by defendant, as in the complaint mentioned.

XV. Defendant further says that said license charge or privilege tax in the complaint named only applies to telegraph lines and wires along railroad lines which are in use by railroads and belong to or are operated in connection with the railroad business, and that the same cannot be made to apply to the telegraph lines of this defendant.

That none of the lines of defendant are a part of or belong to any railroad lines and are not connected in any manner with said railroads or their business, and said lines of defendant are only along the public common highways in said State.

That said tax and charge upon the telegraph lines of defendant in the complaint mentioned is a restraint upon the use of the

19 post-roads of the United States and is an infringement upon the legislative domain of Congress.

That said matters and sums claimed in the complaint are a re-

straint upon the franchises of the defendant in the State of Alabama and are a restraint upon trade and interstate commerce and communication by telegraph between the States and *is* a restraint upon the duly authorized agent of the Government in the transaction of Government business.

That the enforcement of said claims in the complaint mentioned would be against the public policy of the State of Alabama and against the public policy of the United States.

XVI. That by said act of the General Assembly of the State of Alabama entitled "An act to amend subdivision VI of section 454 of the Code," which, as hereinbefore stated, is unconstitutional, *ultra vires*, and void, the attempt is made to assess and tax the property and business of this defendant for public purposes at a greater rate than is assessed and taxed on property of individuals in the State of Alabama, and that such assessment and taxation is not according to the value of said property and is not uniform and is at a much greater rate of taxation for public purposes than other monied capital or property employed or invested in commercial business and employed in other commercial operations within the State of Alabama is taxed or assessed for public purposes, and that said taxes are unequally imposed and are inequitable and contrary to the provisions of constitution of the State of Alabama as well as the Constitution of the United States and laws of Congress.

XVII. And this defendant, further answering, denies that it is liable, as charged in said complaint, for any of the causes of action or claims therein stated.

Wherefore this defendant prays that said complaint be dismissed with costs.

MORDECAI & GADSDEN,
FALKNER & JONES,
Defendant's Attorneys.
R. S. GUERNSEY, *Of Counsel.*

Filed May 2, 1893.

J. W. DIMMICK, *Clerk.*

20 *Order Allowing Amendment.*

MONDAY, *January 8th*, 1894.

THE STATE OF ALABAMA
vs.
POSTAL TELEGRAPH CABLE CO. } No. 741.

On motion of plaintiff, leave is granted to file amended complaint in this case.

Amended Complaint.

In the Circuit Court of the United States for the Middle District of Alabama.

THE STATE OF ALABAMA, Plaintiff,
vs.
THE POSTAL TELEGRAPH CABLE COMPANY, Defendant.

The plaintiff, by leave of the court, amends its complaint by adding thereto the following counts:

4. And the said plaintiff claims of the said defendant the sum of one thousand eight hundred and sixteen dollars, for that whereas heretofore, to wit, on the first day of January, 1890, and for more than sixty days thereafter, the defendant did engage in the business of a telegraph company between points wholly within the State of Alabama, and did run and operate four hundred and eight miles of telegraph line within the State of Alabama, and did engage in the general public telegraph business of transmitting messages by, along, and over its said line from points wholly within the State of Alabama to other points wholly within the State of Alabama, whereby and by force of the statute in such cases made and provided it became and was the duty of the defendant to pay in advance, on the first day of January, 1890, to the auditor of the State of Alabama, a privilege tax of five hundred dollars, together with the further sum of one dollar for each mile of telegraph line so run and operated by it within the State of Alabama—that is to say, a privilege tax of nine hundred and eight dollars; and plaintiff avers that the defendant failed and refused to pay said privilege tax, whereby and by force of the statute in such cases made and provided it became and was and is liable to pay to the plaintiff a penalty in double the amount of said tax—that is to say, a penalty of one thousand eight hundred and sixteen dollars—for which plaintiff here sues.

5. And the said plaintiff claims of the said defendant the further and additional sum of one thousand eight hundred and sixteen dollars, for that whereas heretofore, to wit, on the first day of January, 1891, and for more than sixty days thereafter, the defendant did engage in the business of a telegraph company between points wholly within the State of Alabama, and did run and operate four hundred and eight miles of telegraph line within the
21 State of Alabama, and did engage in the general public telegraph business of transmitting messages by, along, and over its said line from points wholly within the State of Alabama to other points wholly within the State of Alabama, whereby and by force of the statute in such cases made and provided it became and was the duty of the defendant to pay in advance, on the first day of January, 1891, to the auditor of the State of Alabama, a privilege tax of five hundred dollars, together with the further sum of one dollar for each mile of telegraph line so run and operated by it within the State of Alabama—that is to say, a privilege tax of nine hundred

and eight dollars; and plaintiff avers that the defendant failed and refused to pay said tax, whereby and by force of the statute in such cases made *and* provided it became and was and is liable to pay to the plaintiff a penalty in double the amount of said tax—that is to say, a penalty of one thousand eight hundred and sixteen dollars—for which plaintiff here sues.

6. And the said plaintiff claims of the said defendant the further and additional sum of one thousand eight hundred and sixteen dollars, for that whereas heretofore, to wit, on the first day of January, 1892, and for more than sixty days thereafter, the defendant did engage in the business of a telegraph company between points wholly within the State of Alabama, and did run and operate four hundred and eight miles of telegraph line within the State of Alabama, and did engage in the general public telegraph business of transmitting messages by, along, and over its said line from points wholly within the State of Alabama to other points wholly within the State of Alabama, whereby and by force of the statute in such cases made and provided it became and was the duty of the defendant to pay in advance, on the first day of January, 1892, to the auditor of the State of Alabama, a privilege tax of five hundred dollars, together with the further sum of one dollar for each mile of telegraph line so run and operated by it within the State of Alabama—that is to say, a privilege tax of nine hundred and eight dollars; and plaintiff avers that the defendant failed and refused to pay said tax, whereby and by force of the statute in such cases made and provided it became and was and is liable to pay to the plaintiff a penalty in double the amount of said tax—that is to say, a penalty of one thousand eight hundred and sixteen dollars—for which plaintiff here sues.

WM. L. MARTIN,
Attorney General of Alabama.

Filed January 8, 1894.

J. W. DIMMICK, *Clerk.*

22 *Answer to Amended Complaint.*

UNITED STATES OF AMERICA, }
District of Alabama. }

In the Circuit Court, Fifth Circuit.

THE STATE OF ALABAMA, Plaintiff, }
vs.
THE POSTAL TELEGRAPH CABLE COMPANY, Defendant. }

The defendant, The Postal Telegraph Cable Company, answering the amended complaint of the plaintiff herein, The State of Alabama, says:

I. That it denies each and every allegation therein contained not hereinafter specifically admitted.

II. That the defendant admits and alleges that it is a telegraph company duly incorporated and organized under the laws of the

State of New York, and was, on the first day of January, 1890, 1891, and 1892, respectively, engaged in and still continues to carry on the business of a telegraph company, having offices in various cities and towns in the State of Alabama, for the purpose of receiving and sending telegraphic messages and maintaining and operating certain lines of telegraph on the various post-roads, public roads, and railroads extending over, across, leading into and from the State of Alabama to the State of Mississippi and other points in other States in the United States and in the Dominion of Canada, and that by its charter it is authorized to construct, maintain, and operate lines of telegraph in and between the various States of the Union, including the State of Alabama.

This defendant admits that during the years 1890, 1891, and 1892, respectively, it owned within the State of Alabama, for the purposes of interstate commerce and as governmental agent of the United States of America, as follows:

In the year 1890, 133.1 miles of line on railroads; none on county roads. In 1891 and 1892, respectively, 133.1 miles on railroads and 262 miles on county roads, both railroads and county roads being post-roads of the United States, and that said lines were so operated by this defendant for the purposes of interstate commerce and as governmental agent of the United States of America, as hereinafter set forth.

23 This defendant admits and alleges that during the years 1890, 1891, *and* 1892, respectively, it did receive and send some messages from points wholly within the State of Alabama to other points also wholly within the State of Alabama, both for the public and Government of the United States, as its agent, but such intrastate business (general and governmental) was very small in proportion to the interstate commerce transacted to and from the State of Alabama during said years respectively.

III. That this defendant is also lessee of the Atlantic Postal Telegraph Cable Company, which was, prior to the said first day of January, 1890, and still is a telegraph company duly incorporated and organized under the laws of the States of New York, and by its charter authorized to lease, construct, maintain, and operate lines of telegraph in and between the various States of the Union, and also including the State of Alabama, and that this defendant is also the lessee or owner of many other telegraph lines that run in, through, and over most of the States and Territories of the United States, including the States of North Carolina, South Carolina, Georgia, Alabama, Mississippi, Louisiana, New York, New Jersey, Pennsylvania, Maryland, District of Columbia, and many of the Western States, and that as such lessee and owner this defendant is engaged in the general public telegraph business of transmitting messages for commercial purposes, by, along, and over its lines, in, from, through, and across the State of Alabama and many other States and Territories of the Union, and has offices for the receiving and sending of messages by telegraph in each and every State and Territory wherein the lines owned or leased by it extend, and has offices in various cities and towns of the State of Alabama for the general

purposes of its business from which its poles and wires run and extend over the public highways, post-roads, and public roads throughout the State of Alabama across and into the State of Georgia and Mississippi, respectively, and also extending and passing therefrom into other adjoining States of the Union at different points.

IV. That on or about the 6th day of March, 1886, this defendant, the said The Postal Telegraph Cable Company, duly filed its written acceptance with the Postmaster General of the United States of the restrictions and obligations of the act of Congress entitled "An act to aid in the construction of telegraph lines and to secure
24 to the Government the use of the same for postal, military, and other purposes," approved July 24th, 1866, now title 65 of the United States Revised Statutes, relating to the occupancy of post-roads of the United States by telegraph lines, and that in pursuance thereof the Postmaster General had, at the times hereinafter stated, designated this defendant as one of the telegraph companies that must transmit messages for the United States at a price and rate fixed by the said Postmaster General; which said designation is still of force, and this defendant is still engaged as a governmental agent of the United States and was at the times hereinafter mentioned so engaged in transmitting messages for the Government of the United States between its various offices, not only from points within the State of Alabama to points without the State of Alabama, but also for such governmental officers from points wholly within the State of Alabama to other points also wholly within the said State.

V. That this defendant, proceeding thereunder, did construct and now has in operation its lines on the various public roads and post-roads of the United States within the State of Alabama and in all of the States and Territories into which its lines extend and in accordance with the authority of said charter and said act of Congress, and at the present time, as well as at the times hereinbefore and hereinafter referred to, was and still is maintaining and operating said lines of telegraph on the various highways and post-roads as aforesaid leading to, over, through, and across the said State of Alabama to the State of Georgia, as well as to the State of Mississippi, and passing into by continuous lines many other States and Territories of the United States, including North Carolina, South Carolina, Virginia, Louisiana, District of Columbia, Maryland, Delaware, Pennsylvania, New York, New Jersey, Massachusetts, and other States of the Union.

VI. That the said telegraph lines so running into and through the said State of Alabama connect with and extend beyond the termini of said railroads and post-roads and other highways, such post-roads and rivers making continuous lines of telegraph from the offices of the said company to the various cities and towns in the said State of Alabama to, through, and over many of the principal railroads, highways, post-roads, and military roads in and of the United States, having offices for the transaction of telegraphic business in the various departments of the Government at Washington,

in the District of Columbia, and in nearly all the principal
25 cities, towns, and villages of the United States and Territories thereof.

VII. That all of the said railroads and highways so leading into and through the said State of Alabama, as well as in the United States, are public highways, and that the mails of the United States are regularly carried thereon and delivered therefrom under the authority and direction of the Postmaster General, and that the said railroads and highways and each of them, as well as the public roads in the State of Alabama, through which said lines of telegraph run, are post-roads of the United States.

VIII. That said telegraph lines are also constructed over, under, and across the navigable streams of the United States in the State of Alabama and in the other States of the Union, but in all cases such lines are so constructed and maintained so as not to obstruct the navigation of said streams and the ordinary travel on said military and post roads.

IX. That said telegraph company was before and during the years commencing respectively the first day of January, 1890, the first day of January, 1891, and the first day of January, 1892, and now is engaged in the business of receiving and sending telegrams over said lines from the public between its said offices in the State of Alabama and other places in other States and Territories of the United States and to and from foreign countries, and also in sending telegraphic communications between the several departments of the Government of the United States and their officers and agents, giving priority to said official telegraphic communications over all other business; and this defendant alleges that said official telegraphic messages have been sent and are sent at rates which have been fixed by the Postmaster General annually since the 6th day of March, 1886.

X. And this defendant further alleges that by its name and by virtue of the act of incorporation and subject to the Constitution and statute laws of the United States it was on and previous to the first days of January, 1890, 1891, and 1892 respectively and still is engaged in said telegraph business for the purpose of interstate commerce and is a governmental agent of the United States of America, operating its lines of telegraph in, upon, and along the post-roads of the United States in, through, and over the public highways of the United States within the State of Alabama, both
from its offices within said State of Alabama to those without
26 the said State of Alabama, as hereinbefore set forth, as well as its offices also within the State of Alabama, as such governmental agent of the United States.

XI. That being so engaged in the business of transmitting telegraphic messages for the purpose of interstate commerce and as a governmental agent of the United States of America on and previous to the times hereinafter mentioned, as well as now, and having for said purpose offices within the State of Alabama, this defendant alleges that it is not subject or liable to the provisions of an act of the General Assembly of the State of Alabama entitled "An act to

amend subdivision 6 of section 454 of the Code, approved February 28th, 1889, and for a further defense this defendant says:

XII. That the said act of the General Assembly of the State of Alabama under which it is sought to hold this defendant liable, as alleged in said amended complaint, is in contravention to and in violation of the provisions of section 5263 of the Revised Statutes of the United States and also the Constitution of the United States, as well as the provisions of article XI of the constitution of the State of Alabama, and is "*ultra vires*" and void.

XIII. And for a further affirmative defense this defendant alleges that its various offices within the State of Alabama are merely initial points for sending telegraphic messages elsewhere and terminal points for receiving such messages, but that the sending, receiving, and carrying of such messages is a continuous and complete transaction, extending almost simultaneously along its different entire lines and routes from the several various offices within the said State of Alabama to and from different points within and without the State of Alabama, as hereinbefore alleged.

XIV. That under and by virtue of article XI of the constitution of the State of Alabama all property must be assessed and taxed according to its value for purposes of revenue.

That no law can be passed that will levy a tax of more than ¾ of 1% upon the value of property taxed.

That no county can levy more than one-half of 1% upon the value of taxable property.

That corporations can only be taxed in the same manner, form, and extent as individuals.

Defendant further says that it is taxed upon all its property in Alabama according to its assessed value in manner and form pursuant to section 504 of the Code of Alabama.

27 This defendant also says that under the provisions of the laws of the State of Alabama it is subject to the laws of the State which require the annual payment of specific license fees and charges in cities and towns for the privilege of doing its business therein, in addition to a tax upon property, and also a tax on its gross receipts; that said license charges and fees often exceed more than 10% of the value of the property of defendant located within the limits of such city and town in the State of Alabama.

Defendant further says that this action is brought to recover a privilege or license tax imposed for the purpose of revenue in addition to the taxation upon the value of the property of defendant and in addition to local license charges and fees annually imposed by cities and towns upon defendant for the purpose of revenue.

This defendant admits that it did not make the report of its miles of wire or pay the tax in the amended complaint mentioned; that said report was for the purpose of imposing upon and exacting an illegal and unconstitutional tax from defendant, and was for no other purpose or object, and is void, and defendant cannot be made liable for any penalty for said neglect.

That said sum claimed as a State privilege tax is in addition to all other annexed taxes and license charges imposed upon the defendants,

and will greatly exceed the sum of three-fourths of one per cent. upon the value of the property of defendant in the State of Alabama.

That the property of the like nature of defendant's which *are* used by domestic corporations in the State of Alabama *are* not taxed or assessed or charged by law for privileges in the manner or form or nature or extent as is this defendant, as in the amended complaint mentioned.

That there are a large number of miles of wire similar to those of defendant *and* are used as electrical conductors for telephone and electric light and electric *lower* purposes within the State of Alabama, and that the same are not taxed or assessed or charged by law for privileges in the manner or form or nature or extent as *is* this defendant, as set forth in the amended complaint; that said taxes as in the amended complaint mentioned are not imposed upon the defendant or its property or business in the same manner
28 or form or nature as are taxed imposed, or required to be paid by individuals upon property of business in the State of Alabama.

That the telegraph wires used by the defendant in the amended complaint mentioned do not exceed in value the sum of fifteen dollars per mile for each mile thereof, and that property of like nature and use belonging to other corporations in the State of Alabama is of much more value than is that of defendant, and yet it is assessed and taxed to the extent only and in the manner and amount as is that in use by defendant, as in the amended complaint mentioned.

XV. Defendant further says that said license charge or privilege in tax the complaint named only applies to telegraph lines and wires along railroad lines which are in use by railroads and belong to or are operated in connection with the railroad business, and that the same cannot be made to apply to the telegraph lines of this defendant.

That said tax and charge upon the telegraph lines of defendant in the amended complaint mentioned is a restraint upon the use of the post-roads of the United States and is an infringement upon the legislative domain of Congress.

That said matters and sums claimed in the amended complaint are a restraint upon the franchises of the defendant in the State of Alabama and are a restraint upon trade and interstate commerce and communication by telegraph between the States and *is* a restraint upon the duly authorized agent of the Government in the transaction of Government business.

That the enforcement of said claims in the amended complaint mentioned would be against the public policy of the State of Alabama and against the public policy of the United States.

XVI. That by said act of the General Assembly of the State of Alabama entitled "An act to amend subdivision VI of section 454 of the code," which, as hereinbefore stated, is unconstitutional, *ultra vires*, and void, the attempt is made to assess and tax the property and business of this defendant for public purposes at a greater rate

than is assessed and taxed on property of individuals in the State of Alabama, and that such assessment and taxation is not according to the value of said property and is not uniform and is at a much greater rate of taxation for public purposes than other monied capital or property employed or invested in commercial business and employed in other commercial operations within the State of Alabama is taxed or assessed for public purposes, and that said taxes are unequally imposed and are inequitable and contrary to the provisions of — constitution of the State of Alabama as well as to the Constitution of the United States and laws of Congress.

XVII. And this defendant, further answering, denies that it is liable as charged in said amended complaint for any of the causes of action or claims therein stated.

Wherefore this defendant prays that said complaint be dismissed with costs.

MORDECAI & GADSDEN,
Defendant's Attorneys.
R. S. GUERNSEY,
FALKNER & JONES,
Of Counsel.

Filed January 23, 1894.

J. W. DIMMICK, *Clerk.*

Agreed Statement of Facts.

UNITED STATES OF AMERICA, }
District of Alabama. }

In the Circuit Court, Fifth Circuit.

THE STATE OF ALABAMA, Plaintiff, }
vs.
THE POSTAL TELEGRAPH CABLE COMPANY, Defendant. }

The following are the facts of this case upon which it is agreed the court shall render judgment without regard to the pleadings as if they put in issue the facts herein stated:

That the defendant is a telegraph company duly incorporated and organized under the laws of the State of New York, and was, on the first day of January, 1890, 1891, and 1892, respectively, engaged in and still continues to carry on the business of a telegraph company, having offices in various cities and towns in the State of Alabama for the purpose of receiving and sending telegraphic messages and maintaining and operating certain lines of telegraph on the various post-roads, public roads, and railroads extending over, across, leading into and from the State of Alabama to the State of Mississippi and other points in other States in the United States and in the Dominion of Canada, and that by its charter it is authorized to construct, maintain, and operate lines of telegraph in and between the various States of the Union, including the State of Alabama.

The defendant admits that during the year 1890, '91, '92, respectively, it owned within the State of Alabama for the purposes of interstate commerce and as governmental agent of the United States of America as follows:

In the year 1890, 133.1 miles of line on railroad; none on county roads. In 1891 and 1892, respectively, 133.1 miles on railroads and 262 miles on county roads, both railroads and county roads being post-roads of the United States, and that said lines were so operated by this defendant for the purposes of interstate commerce and as governmental agents of the United States of America, as hereinafter set forth; that during the years 1890, 1891, and 1892, respectively, defendant did receive and send messages from points wholly within the State of Alabama to other points also wholly within the State of Alabama, both for the public and the
31 Government of the United States as its agents, but such interstate business (general and governmental) was very small in proportion to the interstate commerce transacted to and from the State of Alabama during said years respectively.

That on or about the 6th day of March, 1885, this defendant, the said Postal Telegraph Cable Company, duly filed its written acceptance with the Postmaster General of the United States of the restriction and obligation of the act of Congress entitled "An act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military, and other purposes," approved July 24th, 1866, now title 65 of the U. S. Revised Statutes, relating to the occupancy of post-roads of the United States by telegraph lines, and that in pursuance thereof the Postmaster General had, at the times hereinafter stated, designated this defendant as one of the telegraph companies that must transmit messages for the United States at a price and rate fixed by the said Postmaster General, which said designation is still of force, and this defendant is still engaged as a governmental agent of the United States, and was at the time hereinafter mentioned so engaged in transmitting messages for the Government of the United States between its various offices not only from points within the State of Alabama to points without the State of Alabama, but also from such governmental offices from points wholly within the State of Alabama to other points also wholly within the said State.

That this said defendant, proceeding thereunder, did construct and has now in operation on its lines on the various public roads and post-roads of the United States within the State of Alabama and in all of the States and Territories into which its lines extend, and in accordance with the authority of said charter and said act of Congress, and at the present time, as well as at the times hereinbefore and hereinafter referred to, was and still is maintaining and operating said lines of telegraph on the various highways and post-roads as aforesaid leading into, over, through, and across the State of Alabama to the State of Georgia, as well as to the State of Mississippi, and passing into by continuous line many other States and Territories of the United States, including North Carolina, South Carolina, Virginia, Louisiana, District of Columbia, Maryland, Dela-

ware, Pennsylvania, New York, New Jersey, Massachusetts, and other States of the Union.

32 That the said telegraph lines so running into and through the said State of Alabama connect with and extend beyond the termini of said railroads and post-roads and other highways, such post-roads and rivers making continuous lines of telegraph from the offices of the said company in the various cities and towns in the said State of Alabama to, through, and over many of the principal railroads, highways, post-roads, and military roads in and of the United States, having offices for the transaction of telegraphic business in the various departments of the Government at Washington, in the District of Columbia, and in nearly all of the principal cities, towns, and villages of the United States and Territories thereof; that all of the said railroads and highways so leading into and through the said State of Alabama as well as in the United States are public highways, and that the mails of the United States are regularly carried thereon and delivered therefrom under the authority and direction of the Postmaster General, and that the said railroads and highways and each of them as well as the public roads in the State of Alabama through which said lines of telegraph run are post-roads of the United States.

That said telegraph lines are also constructed over, under, and across the navigable streams of the United States in the State of Alabama and in the other States of the Union, but in all such cases such lines are so constructed and maintained so as not to obstruct the navigation of said streams and the ordinary travel on said military and post roads.

That said telegraph company was before and during the years commencing respectively on the first day of January, 1890, first day of January, 1891, and the first day of January, 1892, and now is engaged in the business of receiving and sending telegrams over said lines for the public between its said offices in the State of Alabama and other places in other States and Territories in the United States and to and from foreign countries, and also in sending telegraphic communications between the several departments of the Government of the United States and their officers and agents, giving priority to said official telegraphic communications over all other business, and that said official telegraphic messages have been and are sent at the rates which have been fixed by the Postmaster General annually since the 6th day of March, 1886.

33 This defendant admits that by its name and by virtue of the act of incorporation and subject to the Constitution and statute laws of the United States it was on and previous to the first days of January, 1890, 1891, and 1892, respectively, and still is engaged in said telegraph business for the purpose of interstate commerce, both for the public and as a governmental agent of the United States of America, operating its lines of telegraph in, upon, and along the post-roads of the United States in, through, and over the public highways of the United States within the State of Alabama, both from its offices within the State of Alabama to those without the State of Alabama, as hereinbefore set forth, as well as to its offices

also within the State of Alabama, both for the public as well as such governmental agent of the United States.

That, being so engaged in the business of transmitting telegraphic messages for the purpose of interstate commerce, both for the public and as a governmental agent of the United States of America, on and previous to the times hereinafter mentioned as well as now, — has for said purposes offices within the State of Alabama.

The defendant admits that its various offices within the State of Alabama are merely initial points for sending telegraphic messages elsewhere and terminal points for receiving such messages, both inter and intra state business, but that the sending, receiving, and carrying of such messages is a continuous and complete transaction, extending almost simultaneously along its entire line and route from the several various offices within the said State of Alabama to and from different points both within and without the State of Alabama, involving both inter and intra state commerce.

That under and by virtue of article II of the constitution of the State of Alabama all property must be assessed and taxed according to its value for the purposes of revenue.

Defendant further says that it is taxed upon all its property in Alabama according to its assessed value in manner and form pursuant to sect. 504 of the Code of Alabama.

That under the provisions of the Laws of the State of Alabama it is subject to the laws of the State, which require the annual payment of specific license fees and charges in cities and towns for the privilege of doing its business therein, in addition to a tax upon property.

That this action is brought to recover the privilege or license tax imposed for the purpose of revenue in addition to the taxation upon the value of the property of defendant and in addition
34 to local license charges and fees annually imposed by cities and towns upon defendant for the purpose of revenue.

The defendant admits that it did not make a report of its miles of wire or pay the tax in the complaint mentioned.

That said sum claimed as a State privilege tax is in addition to all other annual taxes imposed upon the property of the defendant, and the privilege tax here claimed will greatly exceed the sum of three-fourths of one per cent. upon the value of the taxable property of defendant in the State of Alabama.

That there are a large number of miles of wire similar to those of defendant which are used as electrical conductors for telephones and electric lights and electric power purposes within the State of Alabama, and that the same are not taxed or assessed or charged by law for privileges in the manner of form or nature or extent as is this defendant, as set forth in the amended complaint.

That the telegraph wires used by the defendant in the mentioned complaint do not exceed in value the sum of twenty-five dollars per mile for each mile of wire thereof, and the value of poles supporting the same does not exceed thirty-eight dollars per mile, and that these are the values at which they were assessed under the general revenue laws of the State, as shown by the State Auditor's

Report for 1890, page 86; for 1891, Exhibit 7, page 10, and for 1892, Exhibit 7, page 11.

R. C. BRICKELL,
W. L. MARTIN,
Att'y General, for Plaintiff.
R. S. GUERNSEY,
MORDECAI & GADSDEN,
FALKNER & JONES,
For Defendant.

Filed February 16, 1894.

J. W. DIMMICK, *Clerk.*

35 FRIDAY, *February* 16, 1894.

THE STATE OF ALABAMA)
vs.
THE POSTAL TELEGRAPH CABLE CO.)

This cause came on to be heard this day, and the attorneys representing the respective parties agreed upon statement of facts.

During the argument of the case court adjourned until tomorrow morning at 10 o'clock.

Judgment Entry.

SATURDAY, *February* 17, 1894.

THE STATE OF ALABAMA)
vs.
THE POSTAL TELEGRAPH CABLE CO.)

This cause came on to be further heard this day upon the pleadings and agreed statement of facts. After further argument by counsel the court took the case under advisement.

Judgment Entry.

THURSDAY, *March* 1, 1894.

THE STATE OF ALABAMA)
vs.
THE POSTAL TELEGRAPH CABLE CO.)

Came the parties, by attorneys, and, by consent in writing, waive a trial by jury and submit the cause to the decision and judgment of the court on an agreed statement of facts, which is of file, and, the same having been duly examined and considered by the court, it is by the court considered and adjudged that the plaintiff have and recover of the defendant the sum of three thousand eight hundred and forty-six & $\frac{2}{100}$ dollars, besides the costs herein expended, for which execution may issue.

36 *Opinion of the Court.*

In the Circuit Court of the United States for the Middle District of Alabama.

THE STATE OF ALABAMA)
vs.
THE POSTAL TELEGRAPH CABLE CO.)

Heard upon an agreed statement of facts.

William L. Martin, attorney general, for the State of Alabama, and Robert C. Brickell, for the petitioner.

Mordecai & Gadsden and Jones & Falkner, for defendant telegraph Co.

The facts appear in the opinion of the court.

BRUCE, *J.*:

This is a suit to enforce the collection and payment of a tax and penalty claimed by the State of Alabama from the defendant, The Postal Telegraph Cable Company.

The statute under which the tax is imposed is in these words:

"SECTION 1. Be it enacted by the General Assembly of Alabama, That subdivision six of section 154 of the Code of 1886 be amended so as to read as follows: That all express and telegraph and sleeping-car companies doing business between points wholly within this State, and without reference to their interstate business, shall pay in advance on the first day of January in each year, to the auditor of the State of Alabama, a privilege tax of five hundred dollars, together with one dollar for each mile of telegraph line, or of railroad tracks, on or along which the line of said companies operate or extend; and no express or telegraph company which has paid the privilege tax hereby required, shall be liable to pay any other privilege or other tax in this State, except licenses required by cities and towns, and except upon their real estate, fixtures and other property, which shall be taxed at the same rate as is now levied and collected upon other property in this State: Provided, That all express or telegraph companies which have heretofore paid their taxes to the State under existing laws, for the year 1889, are hereby exempt from the provisions of this clause for said year; and provided further, that all telegraph companies whose lines on which business is done wholly within the State, do not exceed
37 150 miles, shall pay, at the same time and in the same manner and for the same purpose a privilege tax at the rate of one dollar a mile for each mile of railroad along or upon which they operate or do business and no more; and further provided, that said company, or some agent thereof, shall, when making payment of the tax hereinbefore mentioned, report, under oath the mileage of railroad operated by them respectively, and in default of the payment of said tax, or the making of said report for sixty

days after maturity of said tax, a penalty of double the amount of the same shall be imposed on such defaulting companies. Approved February 28th, 1889."

From the agreed statement of facts it appears that the defendant is a New York corporation authorized by its charter to construct, maintain, and operate lines of telegraph in and between the various States of the Union, including the State of Alabama; that during the years 1890, 1891, and 1892 respectively it owned within the State of Alabama a stated number of miles of line on railroad and county roads and did "receive and send messages from points wholly within the State of Alabama to other points also wholly within the State of Alabama, both for the public and for the Government of the United States as its agent."

It also appears from the agreed statement of facts that the defendant company has accepted the provisions of the act of Congress of July 24, 1866, now known as title 65 of the Revised Statutes of the United States, and that the lines of the company were owned and operated on the State of Alabama, for the time for which the tax is claimed, for the purposes of interstate commerce and Government agents of the United States; also that during the same time the defendant company paid taxes upon all its real and personal property within the State of Alabama, the same being assessed and the taxes paid upon it as is the property of other corporations and individuals in the State.

We have, then, the statement that at and during the time for which the tax is claimed the defendant company was engaged *of* the business of intrastate commerce within the territory of the State of Alabama, and, that being the fact, it falls within the statute of the State, and upon what ground can it refuse to pay the tax imposed under the statute?

It is stated that its intrastate business was very small in proportion to its other business, but it is difficult to see how that can affect the question here, because the tax is imposed upon
38 telegraph and other companies without regard to the volume of business transacted in the State or what proportion their intrastate business may bear to its interstate and business as Government agent.

The statute calls the tax a privilege tax. It is, perhaps, of minor importance what the tax is called, whether a license tax, occupation tax, privilege tax, or what not. The defendant company is a foreign corporation doing business in this State and must bear the burdens and comply with the conditions upon which the State allows it to do business within its jurisdiction, and if it falls within the statute it must pay the tax, unless the statute is violative of some *principal* which renders it void.

The defendant's proposition is that the statute is violative of the constitutional provisions which gives Congress the power to regulate commerce between the States, and that while it does do an intrastate business wholly within the State of Alabama that it also does an interstate business, and that as a Government agent it does both

an inter and an intra state business, and that therefore it cannot be taxed by a State.

It may be considered settled law that if the defendant company engaged within the State in an interstate commerce and Government business only, one or both, it could not be excluded from the State or burdened with any tax imposed under the State authority, for the power to tax might be used to destroy, and such tax would be violative of the constitutional power of Congress to regulate commerce with foreign nations and with the several States, and also violative of the principle that the agencies of the Federal Government in carrying out its governmental powers are beyond the taxing power of the several States.

No elaboration of this proposition is necessary. The cases in which the Supreme Court of the United States have discussed and settled these questions are numerous. Those which seem to be in point here in the case at bar are—

Telegraph Company *vs.* Texas, 105 U. S., 464.
Ratterman *vs.* Tel. Co., 127 U. S., 411.
W. U. Tel. Co. *vs.* Alabama State Board of Assessment, 132 U. S., 473.
And other cases cited in the opinion in those cases.

The direct question made here in the case at bar is when the defendant telegraph company comes into the State of Alabama
39 to carry on its business and actually establishes its lines and engages in its business, which it claims is mainly that of interstate commerce and governmental business, which latter is both inter and intra the State of Alabama, even though it does take on local business—that is, the receipt, transmission, and delivery of messages for the public for hire wholly within the territory of the State, is it, then, subject to the tax imposed under this statute? In other words, can it, by virtue of its interstate commerce business and its business as a Government agent, claim immunity from the taxing power of the State, though it does not confine its business to interstate commerce or that of governmental agent?

The statute under consideration will not be presumed to be violative of the Constitution of the United States, but the contrary. If it is capable of a construction in harmony with the Constitution, that construction should be given it.

The tax in this cause is not in terms on the gross amount of the receipts of the company derived by it from the business done in the State, as was the case of The Western Union Telegraph Company *vs.* Alabama Board of Assessment, cited *supra*.

The court there, at page 474, speaking of the decision of the supreme court of the State, says: "But having decided that the statute by fair interpretation included all receipts derived from business done in the State and actually received there, though the messages may have been delivered at or may have been sent for delivery from some office out of the jurisdiction of the State court, the court (the Alabama supreme court) held that, though thus con-

strued, the statute is not an authorized interference with interstate commerce."

But the Supreme Court of the United States held otherwise, that it was an authorized interference with the regulations of commerce, and reversed the case on that ground.

In that case the statute, subdivision 6 of section 454 of the Code of Alabama, imposed a tax "on the gross amount of the receipts by telegraph, telephone, and express companies derived from the business done by it in this State at the rate of two dollars on the hundred dollars," and on page 477 of the opinion the court say: "And as the record of the case presents the means by which the receipts arising from commerce wholly within the State and from that which under these definitions may be called interstate commerce can be separated, the judgment of the supreme court of Alabama is reversed and the case remanded to it with directions for further proceedings in conformity with this opinion," thus sustaining the tax on the receipts derived from intrastate commerce.

But the statute we are now considering is not in terms like this statute, and, as already noted, is not a tax upon receipts at all, but is in the nature of a license or privilege tax.

It is the case of a single tax, and if that tax was upon receipts of a telegraph company which were partly derived from interstate commerce and partly from commerce within the State, and which were capable of separation, but were returned and assessed in gross and without separation or apportionment, the statute would be held invalid in proportion to the extent that such receipts were derived from interstate commerce, but otherwise valid, as was the case of Ratterman *vs.* W. U. Tel. Co., cited *supra*.

But that is not the case we have under consideration here, which, though the case of a single tax, is that of a license or privilege tax upon the business of intrastate commerce carried on by a telegraph company within the State.

If, for illustration, the defendant company should erect and maintain two parallel lines across and through the State, on one of which it should receive, transmit, and deliver messages to and from points outside of the State, and also to what may be called governmental business, and on the other line it should confine itself to messages received, transmitted, and delivered to points wholly within the State, can there be any doubt that it would be liable to the tax in question? And, if so, what difference can it make that the defendant company uses the same wires, supported by the same poles, and operated by the same officers and employees, and operates but one line instead of two?

It is to be noticed, also, that the statute in terms meets the objection when it says, "without reference to their interstate business." But the suggestion is made in argument that had the exception in the statute been made by one who was fully cognizant of the law as held in the decided cases, there would have been the additional exception of the business done as a governmental agent, and that here we have the case of a tax imposed under State authority upon an agent of the Federal Government which is engaged in such busi-

ness, both as inter and intra state commerce, and therefore the statute is bad.

41 But, as already intimated, if this defendant company is engaged in transmitting Government messages, and while as such agent it cannot be taxed under State authority, yet it does not follow from that that if it takes on a business in addition to its Government business, which is subject to tax by the State, it may not be taxed. It is true this may to some extent and in an indirect way effect the service of the company as a Government agency, but in Railroad Company *vs.* Pennsiston, 15 U. S. —at Large, 30, the court say:

"It cannot be that a State tax which remotely affects the efficient exercise of a Federal power is for that reason alone inhibited by the Constitution. To hold that would be to deny to the State all power to tax persons or property. Every tax levied by a State withdraws from the reach of the Federal taxation a portion of the property from which it is taken, and to that extent diminishes the subject upon which Federal taxes may be laid.

The States are and they must ever be coexistent with the National Government. Neither may destroy the other. Hence the Federal Constitution must receive a practicable construction. Its limitations and its implied prohibitions must not be extended so far as to destroy the necessary powers of the State or prevent their efficient exercise."

This quotation is carried into the subsequent opinion of the court in the case of W. U. Tel. Co. *vs.* Mass., 125 U. S., and in that case, at page 549, the court say, commenting and combatting the principle that seems to be contended for here: "It was to provide against the recognition of such a principle that this court in the case above cited, while holding that telegrams themselves coming from without a State or sent out of it as a part of their conveyance could not be taxed by the State specifically, nevertheless used the language: that is, property in the State is subject to taxation the same as other property, and it may undoubtedly be taxed in a proper way on account of its occupation and its business."

The proposition might perhaps be illustrated further: The internal revenue laws of the United States require persons who engage in the business of a retail of a wholesale liquor dealer to pay a tax and post what is called the license; but persons paying such a tax and holding the license have, by virtue thereof, no immunity from State taxes, and in many instances the State has not only taxed the business, but has prohibited entirely the sale of

42 liquor, which might be regarded as a somewhat direct interference with the revenues of the Government; and yet such acts of the State legislatures have not been questioned. On the contrary, have been expressly recognized as valid in what are known as the tax cases.

The statute under consideration is called in question as to what is claimed to be discriminations made by it, of which the defendant has a right to complain, but it is not deemed to be objectionable on this ground, or that it has gone beyond constitutional limits, and

the order asked for in the matter of tax and penalty claimed is hereby granted.

Petition for Writ of Error, with Assignments of Error.

In the Supreme Court of the United States.

THE POSTAL TELEGRAPH CABLE CO., Plaintiff in Error, }
vs. }
THE STATE OF ALABAMA, Defendant in Error. }

In the Circuit Court, Fifth Circuit.

UNITED STATES OF AMERICA, }
Middle District of Alabama. }

To the honorable the judges of the circuit court of the United States for the middle district of Alabama:

Now comes your petitioner, The Postal Telegraph Cable Company, the plaintiff in error in the above-entitled action, and petitions for a writ of error from the final decision of the United States circuit court for the middle district of Alabama in the above-entitled action heretofore made upon first day of March, 1894, and prays that a transcript of the record and proceedings under which said order or decree was made and judgment thereupon entered, duly authenticated, may be sent to the said the Supreme Court of the United States, and herewith files the following assignment of errors, which are intended to be urged upon the hearing of said cause in said Supreme Court of the United States, to wit:

I. The said court erred in entering judgment in favor of plaintiff below.

II. Because the court should have held that the action
43 sought to be maintained by the plaintiff below is in contravention to the Constitution and laws of the United States.

III. Because the court should have held that the act of the legislature of the State of Alabama, viz., "An act to amend subdivision 6 of section 454 of the code," approved February 28th, 1889, upon which the action is sought to be maintained, a copy of which is hereto annexed and marked Exhibit "A," is unconstitutional and void so far as it seeks to *impose* the privilege tax sued for, being in contravention to the Constitution and laws of the United States.

IV. Because the court should have held that said act of the legislature of the State of Alabama imposing a privilege tax on plaintiff in error is void because it is an attempt by the State of Alabama to place a restraint upon the duly authorized agent of the Government in the transaction of Government business and is a restraint upon the duly authorized agent of the Government in transaction of Government business.

V. Because the court erred in holding "the defendant company is a foreign corporation doing business in this State and must bear

the burdens and comply with the conditions upon which the State of Alabama allows it to do business within its jurisdiction."

VI. Because the court erred in holding "that the defendant below, by virtue of its interstate commerce business and its business as a Government agent or either, cannot claim immunity from the taxing power of the State, although it does not confine its business to interstate commerce or that of a governmental agent."

VII. Because the court should have held that by said act of the legislature of the State of Alabama the attempt being made to assess and tax the property and business of this defendant for public purposes at a greater rate than is assessed and taxed on property of individuals in the State of Alabama, and such assessment and taxation not being according to the value of said property and being at a much greater rate of taxation for public purposes than other monied capital or property employed or invested in commercial business and employed in other commercial operations within the State of Alabama is assessed or taxed for public purposes, and said taxes being unequally imposed and inequitable and in addition to as ad valorem property tax imposed upon the defendant and paid by it within the State of Alabama, said act of the legislature of the State of Alabama is in violation of the constitution of the
11 State of Alabama as well as the Constitution of the United States and laws of Congress.

VIII. Because the court should have held that said privilege tax attempted to be collected in this case is in violation of the act of Congress of July 24th, 1866, now title 65 of the Revised Statutes of the United States, and is for that reason null and void.

IX. Because the said court should have held that under and by virtue of article II of the constitution of Alabama, "providing that all taxes levied on property in this State shall be assessed in exact proportion to the value of such property;

* * * And that the General Assembly shall not have power to levy in any one year a greater rate of taxation than $\frac{7}{8}$ of 1% of the value of the taxable property within the State of Alabama;

* * * And that the property of private corporations, associations, and individuals in the State of Alabama shall forever be taxed at the same rate," said act of the legislature of the State of Alabama is in contravention to and in violation of said article II of the constitution of the State of Alabama.

X. Because the court should have held that, this defendant being assessed upon all of its property according to its value in the State of Alabama by the authorities of that State and being taxed upon said value for State and county purposes and having paid said taxes, said act of the legislature of the State of Alabama is unconstitutional, *ultra vires*, and void.

XI. Because the court should have held that under the laws of the State of Alabama, this defendant being subject to laws of the State which require the annual payment of specific license fees and charges in cities and towns for the privilege of doing its business therein in addition to a tax upon its property, said act of the Gen-

eral Assembly of the State of Alabama is unconstitutional, *ultra vires*, and void.

XII. Because the court should have held that, this action being brought to recover a privilege or license tax imposed for the purpose of revenue in addition to the taxation upon the value of the property of the defendant and in addition to annual local license charges and fees imposed by cities and towns upon the defendant for the purpose of revenue, and such privilege tax greatly exceeding the sum of $\frac{3}{4}$ of 1% upon the value of the taxable property of defendant in the State of Alabama, said act of the General Assembly of the State of Alabama is unconstitutional, *ultra vires*, and void.

45 XIII. Because the court should have held that said act of the legislature of the State of Alabama imposed and exacted an illegal and unconstitutional tax from this defendant and was for no other purpose or object and is void, and the defendant cannot be made liable for any penalty for neglect to comply with the provisions of said act.

XIV. Because the court should have held that said act of the General Assembly of the State of Alabama imposing penalty of double the amount as specified in said act upon such defaulting company was *ultra vires* and unconstitutional and void and in violation of the constitution of the State of Alabama and also of the 14th amendment of the Constitution of the United States.

XV. Because the said court should have held that said act of the General Assembly of the State of Alabama by the proviso, as follows, was discriminating against defendant in its nature and was in violation of the constitution of the State of Alabama as well as the 14th amendment of the Constitution of the United States.

XVI. Because the court should have held that, the property of like nature to defendant's which *are* used by domestic corporations within the State of Alabama not being taxed or assessed or charged for privileges in the manner or form or nature of extent as is this defendant, said act of the State of Alabama is unconstitutional, *ultra vires*, and void.

XVII. Because said court should have held that, there being a large number of miles of wire similar to those of defendant which are assessed as electrical conductors for telephone and electric lights and electric power purposes within the State of Alabama and the same not being taxed or assessed or charged by law for privileges in the manner or form or nature or extent as is this defendant, said act of the General Assembly of the State of Alabama is unconstitutional, *ultra vires*, and void.

XVIII. Because said court should have held that, said taxes claimed of the defendant not being imposed upon it or its property or business in the same manner or form or nature as are taxed, imposed, or required to be paid by individuals on property or business within the State of Alabama, said act of the General Assembly of the State of Alabama is unconstitutional, *ultra vires*, and void.

XIX. Because said court should have held that, the telegraph

wires used by this defendant not exceeding in value the sum of $25.00 per mile for each mile thereof and upon which assessment State and county taxes were duly paid, said act of the General Assembly of the State of Alabama is unconstitutional, *ultra vires*, and void.

XX. Because the said court should have held that said license charge or privilege tax only applies to telegraph lines and wires along railroad lines which are in actual use by railroads and belong to or are operated in connection with the railroad business, and that the same cannot be made to apply to the telegraph line of this defendant.

XXI. Because the court should have held that, none of the lines of the defendant being a part of or belonging to any railroad lines and not being connected in any way with said railroads or their business, and said lines of defendant being mostly along the common public highway and post-roads in said State, said license charge should not have been imposed upon the defendant and is unconstitutional, *ultra vires*, and void.

46 XXII. Because the court should have held that said tax and charge upon the telegraph line of defendant in the State of Alabama is a restraint upon the use of the post-roads of the United States and is an infringement of the legislative domain of Congress and is in violation of clause 3, section 8, article I, of the Constitution of the United States and is also in violation of the act of Congress of July, 1866, and now known as title 65 of the Revised Statutes of the United States.

XXIII. Because the said court should have held that the matters and sums claimed in the amended complaint are a restraint upon the franchises of the defendant in the State of Alabama and are a restraint upon trade, commerce, and communication by telegraph between the States and are a restraint upon the duly authorized agent of the Government in the transaction of governmental business.

XXIV. Because the court should have held that the enforcement of said claim in the amended complaint mentioned would be against the public policy of the State of Alabama and against the public policy of the United States.

XXV. Because the court should have held that the said act of the General Assembly of the State of Alabama did not afford the petitioner the equal protection of the laws that are applied to individuals upon taxation of property.

XXVI. Because the court should have held that said act of the General Assembly of the State of Alabama is in violation of and in contravention to subdivision 7, section 8, article I, of the Constitution of the United States.

XXVII. Because the court should have held that the said act of the General Assembly of the State of Alabama is in violation of and in contravention to subdivision 18, section 8, article I, of the Constitution of the United States.

XXVIII. Because the court should have held that said act of the General Assembly of the State of Alabama is in violation of and in

contravention to section 1, article 4, of the Constitution of the United States.

XXIX. Because the said court should have held that said act of the General Assembly of the State of Alabama was in violation of and in contravention to the 14th amendment of the Constitution of the United States.

And your petitioner hereto annexes and makes part of this
47 petition the act of the General Assembly of the State of Alabama being known and entitled "An act to amend subdivision 6, section 454, of the Code," approved February 28th, 1889.

Your petitioner further shows that said judgment of the circuit court of the United States for the middle district of Alabama is a final judgment and that in said suit there was drawn in question the validity of a statute of the said State of Alabama, to wit, an act of the General Assembly of the State of Alabama, being known as and entitled "An act to amend subdivision 6, section 454, of the Code," approved February 28th, 1889, on the ground that said act was and is repugnant to the Constitution of the United States, to wit, clauses 3, 7, and 18 of section 8, article 1; section 2, article 6, of the fourteenth amendment of the Constitution of the United States, as well as the act of the Congress of the United States passed July 24th, 1866, now known as title 65 of the Revised Statutes of the United States, and that the decision aforesaid is in favor of the validity of said statute, all of which will more fully appear from the record in said suit, now on file in the office of the clerk of this court, and to which record reference is hereby made; and your petitioner further shows that said act of the General Assembly of the State of Alabama, to wit, "An act to amend subdivision 6, section 454, of the Code," approved February 28th, 1889, is in violation of and in contravention to clauses 3, 7, and 18, section 8, article 1; section 2, article 6; section 1, article 4, and section 1 of the fourteenth amendment of the Constitution of the United States and the act of Congress of the United States approved July 24th, 1866, now known as title 65 of the Revised Statutes of the United States.

Wherefore your petitioner prays that a writ of error be issued in said suit from the Supreme Court of the United States to the United States circuit court for the middle district of Alabama to review said judgment of the United States circuit court for the middle district of Alabama in accordance with law and the usual usage, custom, and practice of the Supreme Court of the United States; and this petitioner will ever pray.

R. S. GUEMSEY,
MORDECAI & GADSDEN,
FALKNER & JONES,
Att'ys for the Postal Tel. Cable Co., Petitioner.

48 STATE OF NEW YORK, }
City & County of New York. }

Personally appeared before me W. H. Baker, who, being duly sworn, says that he is the vice-president of the Postal Telegraph

Cable Company; that he has read the foregoing petition and knows the contents thereof, and that the facts therein set up are true.

WM. H. BAKER.

Sworn to and subscribed before me this 11th day of April, 1894.

THEODORE L. CUYLER, JR.,

[SEAL.] *Notary Public, Kings County.*

Certif. filed in New York county.

EXHIBIT "A."

An act to amend subdivision 6 of section 154 of the Code.

SECTION 1. Be it enacted by the General Assembly of Alabama, That subdivision 6 of section 154 of the Code of 1886, be amended so as to read as follows: That all express and telegraph and sleeping-car companies doing business between points wholly within this State, and without reference to their interstate business, shall pay in advance on the first day of January in each year, to the auditor of the State of Alabama, a privilege tax of five hundred dollars, together with one dollar for each mile of telegraph line or of railroad tracks, on or along which the lines of said companies operate or extend; and no express or telegraph company which has paid the privilege tax hereby required, shall be liable to pay any other privilege or other tax in this State except licenses required by cities and towns, and except upon their real estate, fixtures and other property, which shall be taxed at the same rate as is now levied and collected upon other property in this State:

Provided, That all express or telegraph companies, which have heretofore paid their taxes to the State under existing laws for the year 1889, are hereby exempt from the provisions of this clause for said year; and provided further, that all telegraph companies whose lines on which business is done wholly within the State, do not exceed 150 miles, shall pay, at the same time and in the same manner and for the same purpose, a privilege tax at the rate
49 of one dollar a mile for each mile of railroad along or upon which they operate or do business, and no more; and provided further, that said company, or some agent thereof, shall, when making payment of the tax hereinbefore mentioned, report, under oath the mileage of railroad operated by them respectively, and in default of the payment of said tax, or the making of said report for sixty days after maturity of said tax, a penalty of double the amount of the same shall be imposed on such defaulting companies.

Approved February 28, 1889.

Filed April 26, 1894.

J. W. DIMMICK, *Clerk.*

Assignment of Error.

In the Supreme Court of the United States.

THE POSTAL TELEGRAPH CABLE COMPANY, Plaintiff in Error,
vs.
THE STATE OF ALABAMA, Defendant in Error.

Now comes the said plaintiff in error, the said Postal Telegraph Cable Company, by R. S. Gernsey, Mordecai & Gadsden, and Falkner & Jones, its attorneys, and makes this its assignments of error in the above-entitled action, and assigns and specifies the followins as errors committed upon the trial of said action:

I. The said court erred in entering judgment in favor of plaintiff below.

II. Because the court should have held that the action sought to be maintained by the plaintiff below is in contravention to the Constitution and laws of the United States.

III. Because the court should have held that the act of the legislature of the State of Alabama, viz., "An act to amend subdivision 6 of section 454 of the Code," approved February 28th, 1889, upon which this action is sought to be maintained, a copy of which is hereto annexed and marked Exhibit "A," is unconstitutional and void, so far as it seeks to impose the privilege tax sued for, being in contravention to the Constitution and laws of the United States.

50 IV. Because the court should have held that said act of the legislature of the State of Alabama imposing a privilege tax on plaintiff in error is void because it is an attempt by the State of Alabama to place a restraint upon the duly authorized agent of the Government in the transaction of Government business and is a restraint upon the duly authorized agent of the Government in transaction of Government business.

V. Because the court erred in holding "the defendant company is a foreign corporation doing business in this State and must bear the burdens and comply with the conditions upon which the State of Alabama allows it to do business within its jurisdiction."

VI. Because the court erred in holding "that the defendant below, by virtue of its interstate commerce business and its business as a governmental agent or either, cannot claim immunity from the taxing power of the State, although it does not confine its business to interstate commerce or that of governmental agent."

VII. Because the court should have held that by said act of the legislature of the State of Alabama, the attempt being made to assess and tax the property and business of this defendant for public purposes at a greater rate than is assessed and taxed on property of individuals in the State of Alabama, and such assessment and taxation not being according to the value of said property and being at a much greater rate of taxation for public purposes than other monied capital or property employed or invested in commercial

business and employed in other commercial operations within the State of Alabama is assessed or taxed for public purposes, and said taxes being unequally imposed and inequitable and in addition to an ad valorem property tax imposed upon the defendant and paid by it within the State of Alabama, said act of the legislature of the State of Alabama is in violation of the constitution of the State of Alabama, as well as the Constitution of the United States and laws of Congress.

VIII. Because the court should have held that said privilege tax attempted to be collected in this — is in violation of the act of Congress of July 24th, 1866, now title 65 of the Revised Statutes of the United States, and is for that reason null and void.

IX. Because the said court should have held that under and by virtue of article II of the constitution of the State of Alabama "providing that all taxes levied on property in this State shall be assessed in exact proportion to the value of such property,
51 * * * and that the General Assembly shall not have power to levy in any one year a greater rate of taxation than $\frac{3}{4}$ of 1 % of the value of the taxable property within the State of Alabama, * * * and that the property of private corporations, associations, and individuals in the State of Alabama shall forever be taxed at the same rate," said act of the legislature of the State of Alabama is in contravention to and in violation of said article II of the constitution of the State of Alabama.

X. Because the court should have held that, this defendant being assessed upon all of its property according to its value in the State of Alabama by the authorities of that State, and being taxed upon said value for State and county purposes, and having paid said taxes, said act of the legislature of the State of Alabama is unconstitutional, *ultra vires*, and void.

XI. Because the court should have held that, under the laws of the State of Alabama, this defendant being subject to laws of the State which require the annual payment of specific license fees and charges in cities and towns for the privilege of doing its business therein, in addition to a tax upon its property, said act of the General Assembly of the State of Alabama is unconstitutional, *ultra vires*, and void.

XII. Because the court should have held that, this action being brought to recover a privilege or license tax imposed for the purpose of revenue, in addition to the taxation upon the value of the property of the defendant and in addition to annual local license charges and fees imposed by cities and towns upon the defendant for the purpose of revenue, and such privilege tax greatly exceeding the sum of $\frac{3}{4}$ of 1 % upon the value of the taxable property of defendant in the State of Alabama, said act of the General Assembly of the State of Alabama is unconstitutional, *ultra vires*, and void.

XIII. Because the court should have held that said act of the legislature of the State of Alabama imposed and exacted an illegal and unconstitutional tax from this defendant and was for no other purpose or object and is void and the defendant cannot be made

liable for any penalty for neglect to comply with the provisions of said act.

XIV. Because the court should have held that said act of the General Assembly of the State of Alabama imposing penalty
52 of double the amount as specified in said act upon such defaulting company was *ultra vires* and unconstitutional and void and in violation of the constitution of the State of Alabama and also of the 14th amendment of the Constitution of the United States.

XV. Because the said court should have held that said act of the General Assembly of the State of Alabama by the proviso as follows was discriminating against defendant in its nature and was in violation of the constitution of the State of Alabama as well as the 14th amendment of the Constitution of the United States.

XVI. Because the court should have held that, the property of like nature to defendant's which *are* used by domestic corporations within the State of Alabama not being taxed or assessed or charged for privileges in the manner or form or nature or extent as is this defendant, said act of the State of Alabama is unconstitutional, *ultra vires*, and void.

XVII. Because said court should have held that, there being a large number of miles of wire similar to those of defendant which are assessed as electrical conductors for telephone and electric light and electric power purposes within the State of Alabama, and the same not being taxed or assessed or charged by law for privileges in the manner or form or nature or extent as is this defendant, said act of the General Assembly of the State of Alabama is unconstitutional, *ultra vires*, and void.

XVIII. Because said court should have held that, said taxes claimed of the defendant not being imposed upon it or its property or business in the same manner or form or nature as are taxed, imposed, or required to be paid by individuals on property or business within the State of Alabama, said act of the General Assembly of the State of Alabama is unconstitutional, *ultra vires*, and void.

XIX. Because said court should have held that, the telegraph wires used by this defendant not exceeding in value the sum of $25.00 per mile for each mile thereof, and upon which assessment State and county taxes were duly paid, said act of the General Assembly of the State of Alabama is unconstitutional, *ultra vires*, and void.

XX. Because the said court should have held that said license charge or privilege tax only applies to telegraph lines and wires along railroad lines which are in actual use by railroads and belong to or are operated in connection with the railroad business, and that the same cannot be made to apply to the telegraph line of this defendant.

53 XXI. Because the court should have held that, none of the lines of the defendant being a part of or belonging to any railroad lines and not being connected in any way with said railroads or their business, and said lines of defendant being mostly along

the common public highway and post roads in said State, said license charge should not have been imposed upon the defendant and is unconstitutional, *ultra vires*, and void.

XXII. Because the court should have held that said tax and charge upon the telegraph lines of defendant in the State of Alabama is a restraint upon the use of the post-roads of the United States and is an infringement of the legislative domain of Congress and is in violation of clause 3, section 8, article I, of the Constitution of the United States, and is also a violation of the act of Congress of July, 1866, and now known as title 65 of the Revised Statutes of the United States.

XXIII. Because the said court should have held that the matters and sums claimed in the amended complaint are a restraint upon the franchises of the defendant in the State of Alabama and are a restraint upon trade, commerce, and communication by telegraph between the States and are a restraint upon the duly authorized agent of the Government in the transaction of governmental business.

XXIV. Because the court should have held that the enforcement of said claim in the amended complaint mentioned would be against the public policy of the State of Alabama and against the public policy of the United States.

XXV. Because the court should have held that the said act of the General Assembly of the State of Alabama did not afford the petitioner the equal protection of the laws that are applied to individuals upon taxation of property.

XXVI. Because the court should have held that said act of the General Assembly of the State of Alabama is in violation of and in contravention to subdivision 7, section 8, article I, of the Constitution of the United States.

XXVII. Because the court should have held that the said act of the General Assembly of the State of Alabama is in violation of and in contravention to subdivision 18, section 8, article I, of the Constitution of the United States.

XXVIII. Because the court should have held that said act of the General Assembly of the State of Alabama is in violation of and in contravention to section 1, article 4, of the Constitution of the United States.

54 XXIX. Because the said court should have held that said act of the General Assembly of the State of Alabama was in violation of and in contravention to the 14th amendment of the Constitution of the United States.

And your petitioner hereto annexes and makes part of this petition the act of the General Assembly of the State of Alabama being known and entitled "An act to amend subdivision 6, section 454, of the Code," approved February 28th, 1889.

Wherefore the said plaintiff in error, The Postal Telegraph Cable Company, by R. S. Guernsey, Mordecai & Gadsden, and Falkner & Jones, its attorneys, petitions and prays your honorable court that for reason of the errors hereinbefore specified and set forth the judgment entered in said action in the circuit court of the United

States for the middle district of Alabama adjudging that the State of Alabama have and recover of the said Postal Telegraph Cable Company the sum of three thousand eight hundred and forty-six dollars and twenty cents ($3,846.20), besides the costs therein expended, be reversed; and this your petitioner will ever pray.

R. S. GUERNSEY,
MORDECAI & GADSDEN,
FALKNER & JONES,
Att'ys for Postal Telegraph Cable Co.

EXHIBIT "A."

An act to amend subdivision 6 of section 454 of the Code.

SECTION 1. Be it enacted by the General Assembly of Alabama, that subdivision 6 of section 454 of the Code of 1886, be amended so as to read as follows: That all express and telegraph and sleeping-car companies doing business between points wholly within this State, and without reference to their interstate business, shall pay in advance on the first day of January in each year, to the auditor of the State of Alabama, a privilege tax of five hundred dollars, together with one dollar for each mile of telegraph line or of railroad tracks on or along which the line of said companies operate or extend; and no express or telegraph company which has paid the privilege tax hereby required, shall be liable to pay any other privilege or other tax in this State except licenses required by
55 cities and towns, and except upon their real estate, fixtures and other property, which shall be taxed at the same rate as is now levied and collected upon other property in this State; provided, that all express or telegraph companies, which have heretofore paid their taxes to the State under existing laws, for the year 1889, are hereby exempt from the provisions of this clause for said year; and provided further, that all telegraph companies whose lines on which business is done wholly within the State, do not exceed 150 miles, shall pay, at the same time and in the same manner and for the same purpose, a privilege tax at the rate of one dollar a mile for each mile of railroad along or upon which they operate or do business, and no more; and provided further, that said company, or some agent thereof, shall, when making payment of the tax hereinbefore mentioned, report, under oath, the mileage of railroad operated by them respectively, and in default of the payment of said tax, or the making of said report, for sixty days after maturity of said tax, a penalty of double the amount of the same shall be imposed on such defaulting companies.

Approved February 28, 1889.

Filed April 26, 1894.

J. W. DIMMICK, *Clerk.*

Order Allowing Writ of Error.

UNITED STATES OF AMERICA, }
Middle District of Alabama, }

In the Circuit Court, Fifth Circuit.

THE POSTAL TELEGRAPH CABLE COMPANY, Plaintiff in Error, }
vs. }
THE STATE OF ALABAMA, Defendant in Error. }

And now, to wit, on the 26th day of April, 1894, it is ordered that the writ of error herein prayed for by the Postal Telegraph Cable Company be allowed as prayed for, and that a citation do issue in accordance therewith, returnable on the 25th day of May, in the year of our Lord one thousand eight hundred and ninety-four.

Let the plaintiff in error also file a bond within ten days from the date of this order in the sum of eight thousand dollars ($8,000.00), with security to be approved by one of the judges of the United States court for the district of New York, conditioned that the said plaintiff in error shall prosecute its said writ of
56 error to effect and answer all damages and costs if it shall fail to make good its plea; and the same is hereby made a supersedeas.

April 26, 1894.

JOHN BRUCE,
United States Judge.

Filed April 26th, 1894.

J. W. DIMMICK, *Clerk.*

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the middle district of Alabama, Greeting:

Whereas, in the record and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court of the United States for the middle district of Alabama, before you or some of you, between The State of Alabama, plaintiff, and The Postal Telegraph Cable Company, defendant, wherein was drawn in question the validity of the statute of the General Assembly of Alabama on the ground of its being repugnant to the Constitution of the United States, and also title 65 of the Revised Statutes of the United States, and the decision was in favor of its validity, a manifest error hath happened, to the great damage of the said Postal Telegraph Cable Company, as by its said complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the said parties in this behalf, do command you, if judgment be therein given, that then, under your seal,

distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the — day of May, A. D. 1894, in the said Supreme Court to be then and there held, that, the record of proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, this 26th day of April, in the year of our Lord 1894.

J. W. DIMMICK,
Clerk of the Circuit Court of the United States for the Middle District of Alabama.

Allowed by—
JOHN BRUCE,
United States Judge for the Middle District of Alabama.

Filed April 26th, 1894.

J. W. DIMMICK, *Clerk.*

57 *Bond.*

UNITED STATES OF AMERICA, }
Middle District of Alabama, }

In the Circuit Court, Fifth Circuit.

THE POSTAL TELEGRAPH CABLE COMPANY, Plaintiff in Error, }
vs. }
THE STATE OF ALABAMA, Defendant in Error. }

Know all men by these presents, that we, The Postal Telegraph Cable Company, as principal, and Wm. H. Baker and Edward C. Platt, as sureties, are held and firmly bound unto the State of Alabama in the penal sum of eight thousand dollars ($8,000.00), to be paid to the said State of Alabama: to which payment, well and truly to be made and done, we bind ourselves and each and every of us, jointly and severally, and each of our successors, heirs, executors, and administrators, firmly by these presents.

In witness whereof the said Postal Telegraph Cable Company has caused these presents to be signed by its vice-president and its corporate seal attached, and the said Wm. H. Baker and E. C. Platt have hereunto set their hands and seals this 27th day of April, A. D. 1894.

The condition of the above obligation is such that whereas the above-named The Postal Telegraph Cable Company has prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the circuit court of the United States for the middle district of Alabama:

Now, therefore, the condition of this obligation is such that if the

above-bound Postal Telegraph Cable Company shall prosecute its said writ of error to effect and answer all damages and costs if it shall fail to make good its plea, then this obligation to be void and of no effect; otherwise it shall be and remain in full force and virtue.

POSTAL TELEGRAPH CABLE COMPANY,
[SEAL.] By WM. H. BAKER, *Vice-president.*
WM. H. BAKER. [L. S.]
E. C. PLATT. [L. S.]

Attest: J. O. STEVENS, *Secretary.*

Signed, sealed, and delivered in presence of—
R. S. GUERNSEY.
CHAS. P. BRUCH.

58 STATE OF NEW YORK, } ss:
City and County of New York, }

WM. H. Baker and E. C. Platt, being each first duly sworn, each for himself on his oath deposes and says:

That he is one of the sureties named in the foregoing obligation; that he is a resident citizen and holder in the city of Brooklyn, county of Kings, in the State of New York; that he is worth the sum of sixteen thousand dollars in property within the State of New York over and above his debts and liabilities not by law exempt from execution.

WM. H. BAKER.
E. C. PLATT.

Sworn to and subscribed before me this 27th day of April, A. D. 1894.

THEODORE L. CUYLER, JR.,
[SEAL.] *Notary Public, Kings County.*

Certif. filed in New York Co.

STATE OF NEW YORK, } ss:
City and County of New York, }

On this 27th day of April, A. D. 1894, before me, Theodore L. Cuyler, Jr., a notary public in and for the county and State aforesaid, personally appeared Wm. H. Baker, and known to me to be the vice-president of the said Postal Telegraph Cable Company, and acknowledged to me that he signed and delivered the foregoing instrument on behalf of the said Postal Telegraph Cable Company and caused the corporate seal of said company to be thereunto attached on the day and year mentioned as the act and deed of the said Postal Telegraph Cable Company.

In witness whereof I have hereunto set my hand and affixed my notarial seal the year and day first above written.

THEODORE L. CUYLER, JR.,
[SEAL.] *Notary Public, Kings County.*

Cert. filed in New York Co.

STATE OF NEW YORK, }
City and County of New York, } *ss:*

Personally appeared before me R. S. Guernsey, who, being duly sworn, says:

That he was present and saw the within-named Wm. H. 59 Baker, E. C. Platt, and J. O. Stevens, secretary, sign, seal, and as their respective act and deed deliver the above-written deed, and that he, with Chas. P. Bruch, witnessed the execution thereof.

R. S. GUERNSEY.

Sworn to and subscribed before me this 27th day of April, 1894.

THEODORE L. CUYLER, Jr.,
[SEAL.] *Notary Public, Kings County.*

Cert. filed in New York Co.

I hereby approve the foregoing as good and sufficient security. The sureties to the above bond seem to me good and sufficient.

ADDISON BROWN,
U. S. District Judge.

I hereby approve the above and foregoing appeal bond this May 2, 1894.

JOHN BRUCE, *Judge.*

Filed May 2, 1894.

J. W. DIMMICK, *Clerk.*

Citation.

UNITED STATES OF AMERICA, *ss:*

To the State of Alabama, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, D. C., on the 25th day of May, A. D. 1894, pursuant to the writ of error filed in the clerk's office of the circuit court of the United States for the middle district of Alabama, wherein The Postal Telegraph Cable Company is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, this 26th day of May, in the year of our Lord 1894.

[SEAL.] JOHN BRUCE,
United States Judge for the Middle District of Alabama.

Received in office April 26, 1894.

W. H. TISDALE,
United States Marshal.

Executed April 27th, 1894, by serving a copy on Hon. W. L. Martin, attorney general for the State of Alabama.

W. H. TISDALE,
United States Marshal,
By WM. F. ADAMS,
Deputy U. S. M.

Returned and filed April 27, 1894.

J. W. DIMMICK, *Clerk.*

60 UNITED STATES OF AMERICA, }
Middle District of Alabama, } ss:

I, J. W. Dimmick, clerk of the circuit court of the United States for the middle district of Alabama, hereby certify that the foregoing pages, numbered from 1 to 59, inclusive, contain a full, true, and complete transcript of the record and proceedings in a certain lately depending in said court wherein The State of Alabama was plaintiff and The Postal Telegraph Cable Company defendant as the same appear of record and on file in my office as such clerk.

Seal of the United States Circuit Court, Middle District of Alabama.

In testimony whereof I have hereunto set my hand and caused the seal of said court to be affixed, at Montgomery, in said district, this 2nd day of May, A. D. 1894.

J. W. DIMMICK,
Clerk U. S. Circuit Court, Middle District of Ala.

Endorsed on cover: Case No. 15,586. M. Alabama C. C. U. S. Term No., 702. The Postal Telegraph Cable Company, plaintiff in error, *vs.* The State of Alabama. Filed May 9th, 1894.

155-482
155-472

Office Supreme Court, U
FILED,
NOV 26 1894
JAMES H. McKENNEY,
CLE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 702.

POSTAL TELEGRAPH CABLE COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF ALABAMA.

In Error to the Circuit Court of the United States for the Middle District of Alabama.

Brief of Messrs. Mordecai & Gadsden, for Plaintiff in Error.

CHARLESTON, S. C.
WALKER, EVANS & COGSWELL CO., PRINTERS,
Nos. 3 and 5 Broad and 117 East Bay Streets.
1894.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 702.

POSTAL TELEGRAPH CABLE COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF ALABAMA.

In Error to the Circuit Court of the United States for the Middle District of Alabama.

Brief of Messrs. Mordecai & Gadsden, for Plaintiff in Error.

STATEMENT.

This is an action brought by the State of Alabama against the Postal Telegraph Cable Company, a body corporate under the laws of the State of New York, to enforce the collection of a tax and penalty claimed by the State of Alabama from the defendant, the Postal Telegraph Cable Company, under the following Statute:—

AN ACT TO AMEND SUBDIVISION 6, OF SECTION 454 OF THE CODE.

SECTION 1. *Be it enacted* by the General Assembly of Alabama, That subdivision 6, of Section 454 of the Code 1886, be amended so as to read as follows:—

That all Express and Telegraph and Sleeping-Car Companies doing business between points wholly within this State and without reference to their inter state business, shall pay in advance on the first day of January, in each year, to the

Auditor of the State of Alabama, a privilege tax of five hundred dollars, together with one dollar for each mile of telegraph line or of Railroad tracks, on or along which the lines of said companies operate or extend; and no express or telegraph company which has paid the privilege tax hereby required, shall be liable to pay any other privilege or other tax in this State except licenses required by cities and towns, and except upon their real estate, fixtures and other property, which shall be taxed at the same rate as is now levied and collected upon other property in this State:—

Provided, That all Express or Telegraph Companies, which have heretofore paid their taxes to the State under existing laws for the year 1889, are hereby exempt from the provisions of this clause for said year; *and provided further*, That all telegraph companies whose lines on which business is done wholly within the State, do not exceed 150 miles, shall pay, at the same time and in the same manner and for the same purpose, a privilege tax at the rate of one dollar a mile for each mile of railroad along or upon which they operate or do business, and no more; *and provided further*, That said Company, or some agent thereof, shall, when making payment of the tax hereinbefore mentioned, report under oath the mileage of railroad operated by them respectively, and in default of the payment of said tax, or the making of said report for sixty days after maturity of said tax, a penalty of double the amount of the same shall be imposed on such defaulting companies.

Approved February 28th, 1889.

The complaint (folio 11) alleges in the first cause of action that during the year 1890 the defendant, the Postal Telegraph Cable Co was engaged in business within the State of Alabama, and operated its lines on or along two hundred and fifty miles of railroad track within the State of Alabama, whereby it became liable for a privilege tax of five hundred dollars, together with a further sum of one dollar for each mile of railroad track on or along which the lines of defendant, as such Telegraph Company, operate or extend, and that for the year 1891, the defendant operated two hundred and fifty miles of wire within the State of Alabama, making it liable for a privilege tax of five hundred dollars, together with the further sum of one dollar for each mile of wire so operated, and third, that for the year 1892 the defendant operated three hundred and twenty-eight miles of wire within the State of Alabama, making it liable for a privilege tax of five hundred

dollars, together with a further sum of one dollar per mile for each mile of wire so operated.

The defendant, the Postal Telegraph Cable Company, (folio 13) by way of answer alleges that it is a telegraph company duly incorporated and organized under the laws of the State of New York, and was on the 1st days of January, 1890, 1891 and 1892, respectively, engaged in and still continues to carry on the business of a Telegraph Company, having offices in various cities and towns in the State of Alabama for the purposes of receiving and sending telegraphic messages, and maintaining and operating certain lines of telegraph on the various post roads, public roads and railroads extending over, across, leading into and from the State of Alabama, to the State of Mississippi and other points in other States of the United States, and by its Charter is authorized to construct, maintain and operate lines of telegraph in and between the various States of the Union, including the State of Alabama. That it is the lessee of the Atlantic Postal Telegraph Cable Company, a corporation duly organized under the laws of the State of New York, and by its charter authorized to lease, construct, maintain and operate lines of telegraph in and between the various States of the Union, including the State of Alabama, and that as such lessee and owner this defendant is engaged in the general public telegraph business of transmitting messages for commercial purposes by, along and over its lines in, from, through and across the State of Alabama. That on or about the 6th day of May, 1886, the defendant, the Postal Telegraph Cable Company duly filed its written acceptance with the Postmaster General of the United States of the restrictions and obligations of the Act of Congress, entitled "An Act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military and other purposes," approved July 24th, 1866, and known as Title 65 of the United States Revised Statutes. That under the provisions of said Act this defendant is still engaged as a Governmental agent of the United States, and was at the time hereinafter mentioned so engaged in transmitting messages for the Government of the United States between the various offices not only from points within the State of Alabama to points without the State of Alabama, but also for such Governmental offices from points wholly within the State of Alabama to other points wholly within the State of Alabama. That by its name and by virtue of the Act of Incorporation and subject to the Constitution and Statute laws of the United States, it was on and previous to the 1st day of January, 1890, and still is, engaged in said telegraph business for the purpose of in-

ter-state commerce and as a Governmental agent of the United States of America, operating its lines of telegraph in, upon and along the public roads, which are post roads of the United States within the State of Alabama from its offices within the State of Alabama to those without the State of Alabama as hereinbefore set forth.

On January 8th, 1894, (Folio 21) plaintiff, the State of Alabama, by leave of the Court, filed its amended complaint alleging that in each of the years '90, '91 and '92 the defendant the Postal Telegraph Cable Company operated within the State of Alabama four hundred and eight miles of wire, making it liable for the sum of $1,816.00 for each year. The amended answer of the Postal Telegraph Cable Company is in all respects similar to the original answer except that it admits that during the years 1890, '91 and '92 respectively it owned within the State of Alabama as follows: In the year 1890, 133 1/10 miles on railroads; none on County roads. In 1891 and '92 respectively 133 1/10 miles on railroads and 262 miles on County roads.

The cause came on to be heard upon the amended complaint and answer and the agreed statement of facts from which it appears that the defendant the Postal Telegraph Cable Company is a telegraph company duly chartered under the laws of the State of New York, as a Telegraph Company, having accepted on the 6th of March, 1866, the provisions of the Act of Congress of July 24th, 1866, now known as Title 65 of the Revised Statutes of the United States and being engaged in the business of a Telegraph Company so far as the questions involved in this action are concerned as follows:

This Company has offices in various cities and towns in the State of Alabama for the purpose of receiving and sending telegraphic messages and maintaining and operating certain lines of telegraph on the various post roads, public roads and railroads extending over, across, leading into and from the State of Alabama, in the State of Mississippi and other points in other States of the United States and in the Dominion of Canada, being by its charter authorized to construct, maintain and operate lines of telegraph in and between the various States of the Union, including the State of Alabama. During the years in question this telegraph Company owned within the State of Alabama for the purposes of inter-state commerce and as Governmental agent of the United States, as follows: In the year 1890 133 1/10 miles on railroads, but none on county roads.

In the years 1891 and 1892 respectively 133 1-10 mile on railroads and 262 on county roads, both railroads and county

roads being admittedly postroads of the United States, the lines of this Company were so operated by it for the purposes of inter-state commerce and as Governmental agent of the United States of America.

It is admitted that during the years named the defendant did receive and send messages from points wholly within the State of Alabama to other points also wholly within the State of Alabama, both for the public and the Government of the United States as its agent, but it further appears that such intra-state business (general and Governmental,) was very small in proportion to the inter-state commerce transacted to and from the State of Alabama during the years respectively.

It further appears that under the provisions of existing law in the State of Alabama, during each of the years named, the defendant Company paid taxes upon all of its real and personal property within the State of Alabama, the same being assessed and the taxes paid upon it as is the property of other corporations and individuals in the State, viz: in the year 1890, on a valuation of $12,593.83. In the year 1891 on the same valuation, and in the year 1892, on a valuation of $38,-282.50, each mile of wire during these years being assessed at $25 per mile, and each mile of poles from $38 to $40 per mile.

It further appears that in addition to this tax upon all of its property in Alabama, according to its assessed value, the Company is also subject to the laws of the State which require the annual payment of specific license fees and charges in cities and towns for the privilege of doing its business therein.

It is also admitted that the privilege tax here claimed will greatly exceed the sum of ¾ of 1 per cent. upon the value of the taxable property of the defendant in the State of Alabama. It is further admitted that there are a number of miles of wire similar to those of the defendant Company which are used as electrical conductors for telephone and electric light and electric power purposes within the State, and that the same are not taxed or assessed or charged by law for privileges in the manner or form or nature or extent as is claimed of the defendant in the complaint in this action.

It therefore appears that the defendant corporation and admittedly the Governmental agent of the United States is engaged in the business of a Telegraph Company within the

jurisdiction of the State of Alabama, having offices in said State, from which and in which messages are both sent and received to points both within and without the State of Alabama; that it does business as a Governmental agent of the United States to and from points *wholly within the State of Alabama* as well as to and from points without the State of Alabama.

After hearing argument Judge Bruce filed his decision, (Fol. 36,) sustaining the contention of the plaintiff, the State of Alabama, and entering judgment against the Postal Telegraph-Cable Company for the sum of $3,846.20. From this judgment the plaintiff in error has appealed to this Court upon the following assignments of error:

I. The said Court erred in entering judgment in favor of plaintiff below.

II. Because the Court should have held that the action sought to be maintained by the plaintiff below is in contravention to the Constitution and laws of the United States.

III. Because the Court should have held that the Act of the Legislature of the State of Alabama, viz: "An Act to amend subdivision 6 of Section 454 of the Code, approved February 28th, 1889, upon which the action is sought to be maintained, a copy of which is hereto annexed and marked Exhibit "A," is unconstitutional and void so far as it seeks to impose the privilege tax sued for being in contravention to the Constitution and laws of the United States.

IV. Because the Court should have held that said Act of the Legislature of the State of Alabama imposing a privilege tax on plaintiff in error is void because it is an attempt by the State of Alabama to place a restraint upon the duly authorized agent of the Government in the transaction of Government business, and is a restraint upon the duly authorized agent of the Government in transaction of Government business.

V. Because the Court erred in holding "the defendant Company is a foreign corporation, doing business in this State, and must bear the burdens and comply with the conditions upon which the State of Alabama allows it to do business within its jurisdiction."

VI. Because the Court erred in holding "that the defendant below, by virtue of its inter-state commerce business and its business as a Government agent, or either, cannot claim immunity from the taxing power of the State, although it does not confine its business to inter-state commerce or that of a Governmental agent."

VII. Because the Court should have held that by said Act of the Legislature of the State of Alabama the attempt being made to assess and tax the property and business of this defendant for public purposes at a greater rate than is assessed and taxed on property of individuals in the State of Alabama, and such assessment and taxation not being according to the value of said property and being at a much greater rate of taxation for public purposes than other monied capital or property employed or invested in commercial business and employed in other commercial operations within the State of Alabama is assessed or taxed for public purposes, and said taxes being unequally imposed and inequitable and in addition to an *ad valorem* property tax imposed upon the defendant and paid by it within the State of Alabama, said Act of the Legislature of the State of Alabama is in violation of the Constitution of the State of Alabama as well as the Constitution of the United States and laws of Congress.

VIII. Because the Court should have held that said privilege tax attempted to be collected in this case is in violation of the Act of Congress of July 24th, 1866, now Title 65 of the Revised Statutes of the United States, and is for that reason null and void.

IX. Because the said Court should have held that under and by virtue of Article II of the Constitution of Alabama, "providing that all taxes levied on property in this State shall be assessed in exact proportion to the value of such property. * * * And that the General Assembly shall not have power to levy in any one year a greater rate of taxation than ¾ of 1 per cent. of the value of the taxable property within the State of Alabama. * * * * * And that the property of private corporations, associations and individuals in the State of Alabama, shall forever be taxed at the same rate," said Act of the Legislature of the State of Alabama is in contravention to and in violation of said Article II of the Constitution of the State of Alabama.

X. Because the Court should have held, that this defendant being assessed upon all of its property according to its value, in the State of Alabama, by the authorities of that State, and

being taxed upon said value for State and county purposes, and having paid said taxes, said Act of the Legislature of the State of Alabama is unconstitutional, *ultra vires* and void.

XI. Because the Court should have held that, under the laws of the State of Alabama, this defendant being subject to laws of the State which require the annual payment of specific license fees and charges in cities and towns for the privilege of doing its business therein, in addition to a tax upon its property, said Act of the General Assembly of the State of Alabama is unconstitutional, *ultra vires* and void.

XII. Because the Court should have held, that this action being brought to recover a privilege or license tax imposed for the purpose of revenue, in addition to the taxation upon the value of the property of the defendant, and in addition to annual local license, charges and fees imposed by cities and towns upon the defendant for the purpose of revenue, and such privilege tax greatly exceeding the sum of three-fourths of 1 per cent. upon the value of the taxable property of defendant in the State of Alabama, said Act of the General Assembly of the State of Alabama is unconstitutional, *ultra vires* and void.

XIII. Because the Court should have held, that said Act of the Legislature of the State of Alabama imposed and exacted an illegal and unconstitutional tax from this defendant, and was for no other purpose or object, and is void, and the defendant cannot be made liable for any penalty for neglect to comply with the provisions of said Act.

XIV. Because the Court should have held, that said Act of the General Assembly of the State of Alabama imposing penalty of double the amount as specified in said Act upon such defaulting company was *ultra vires* and unconstitutional and void, and in violation of the Constitution of the State of Alabama, and also of the 14th Amendment of the Constitution of the United States.

XV. Because the said Court should have held, that said Act of the General Assembly of the State of Alabama, by the proviso was discriminating against defendant in its nature, and was in violation of the Constitution of the State of Alabama as well as the 14th Amendment of the Constitution of the United States.

XVI. Because the Court should have held, that the property of like nature to defendant's, which are used by domestic corporations within the State of Alabama not being taxed or assessed or charged for privileges in the manner or form or nature or extent as is this defendant, said Act of the State of Alabama is unconstitutional, *ultra vires* and void.

XVII. Because said Court should have held, that there being a large number of miles of wire similar to those of defendant which are assessed as electrical conductors for telephone and electric power purposes within the State of Alabama, and the same not being taxed or assessed or charged by law for privileges in the manner or form or nature or extent as is this defendant, said Act of the General Assembly of the State of Alabama is unconstitutional, *ultra vires* and void.

XVIII. Because said Court should have held, that said taxes claimed of the defendant not being imposed upon it or its property or business in the same manner or form or nature as are taxed imposed or required to be paid by individuals on property or business within the State of Alabama, said Act of the General Assembly of the State of Alabama is unconstitutional, *ultra vires* and void.

XIX. Because said Court should have held, that the telegraph wires used by this defendant not exceeding in value the sum of $25 per mile for each mile thereof, and upon which assessment State and county taxes were duly paid, said Act of the General Assembly of the State of Alabama is unconstitutional, *ultra vires* and void.

XX. Because the said Court should have held, that said license charge or privilege tax only applies to telegraph lines and wires along railroad lines which are in actual use by railroads, and belong to and are operated in connection with the railroad business, and that the same cannot be made to apply to the telegraph line of this defendant.

XXI. Because the Court should have held, that none of the lines of the defendant being a part of or belonging to any railroad lines and not being connected in any way with said railroad lines, and not being connected in any way with said railroads or their business, and said lines of defendant being mostly along the common public highway and post-roads in said State, said license charge should not have been imposed upon the defendant, and is unconstitutional, *ultra vires* and void.

XXII. Because the Court should have held, that said tax and charge upon the telegraph line of defendant in the State of Alabama is a restraint upon the use of the post-road of the United States, and is an infringement of the legislative domain of Congress, and is in violation of Clause 3, Section 8, Article 1, of the Constitution of the United States, and is also in violation of the Act of Congress of July, 1866, and now known as Title 65, of the Revised Statutes of the United States.

XXIII. Because the said Court should have held that the matters and sums claimed in the amended complaint are a restraint upon the franchises of the defendant in the State of Alabama and are a restraint upon trade, commerce and communication by telegraph between the States and are a restraint upon the duly authorized agent of the Government in the transaction of governmental business.

XXIV. Because the Court should have held that the enforcement of said claim in the amended complaint mentioned, would be against the public policy of the State of Alabama and against the public policy of the United States.

XXV. Because the Court should have held that the said Act of the General Assembly of the State of Alabama, did not afford the petitioner the equal protection of the laws that are applied to individuals upon taxation of property.

XXVI. Because the Court should have held that the said Act of the General Assembly of the State of Alabama, is in violation of, and in contravention to sub-division 7, Section 8, Article 1, of the Constitution of the United States.

XXVII. Because the Court should have held that the said Act of the General Assembly of the State of Alabama, is in violation of, and in contravention to sub-division 18, Section 8, Article 1, of the Constitution of the United States.

XXVIII. Because the Court should have held that said Act of the General Assembly of the State of Alabama, is in violation of and in contravention to Section 1, Article 4, of the Constitution of the United States.

XXIX. Because the said Court should have held that said Act of the General Assemby of the State of Alabama was in violation of, and in contravention to the 14th Amendment of the Constitution of the United States.

The provisions of the Constitution of the State of Alabama which the Court is called upon to examine, are as follows:—

ARTICLE 2, SECTION 1. All taxes levied on property in this State shall be assessed in exact proportion to the value of such property.

SECTION 4. The General Assembly shall not have the power to levy in any one year a greater rate of taxation than $\frac{3}{4}$ of 1 per cent. of the value of the taxable property within this State.

SECTION 6. The property of private corporations, associations and individuals of this State shall forever be taxed at the same rate.

ARGUMENT.

PROPOSITION I.

The Act of the General Assembly of the State of Alabama in so far as it attempts to impose a tax of a dollar per mile upon every mile of telegraph wire owned and operated by the Postal Telegraph Cable Company, within the State of Alabama, is in violation of, and in contravention to Sections 1, 4 and 6 of Article 2 of the Constitution of the State of Alabama.

By an examination of the Act of the State of Alabama, it will be seen that it is both a license tax and a tax on property. It imposes first, a privilege or license tax of five hundred dollars upon a Telegraph Company doing business within the State of Alabama, together with one dollar for each mile of telegraph line on or along which lines of said Company operate or extend. While the tax of five hundred dollars is plainly a privilege tax, the tax of one dollar per mile on each mile of telegraph wire owned by the Company within the State of Alabama, is plainly a tax on property of the Company situate within the State. Article 2, of the State of Alabama, provides that all taxes levied on property in said State shall be assessed in exact proportion to the value of such property. That the General Assembly shall not have power to levy a tax in any one year greater than $\frac{3}{4}$ of 1 per cent. of the value of the taxable property and that the

property of corporations shall be taxed the same as that of individuals. In the correct statement of facts it is admitted that the Postal Telegraph Cable Company, is taxed upon all its real and personal property within the State of Alabama, the same as all other property situate within the State. That this Company has never resisted payment of said taxes and has duly paid the same for the years '90, '91 and '92.

It is further admitted that this Company is subject to a license tax by all municipal corporations within the State which it has also duly paid. And it is further admitted that this additional tax of a dollar per mile for every mile of wire operated by it within the State of Alabama, greatly exceeds $\frac{3}{4}$ of 1 per cent.—the maximum allowed under the Constitution of the State of Alabama The question therefore upon which the validity of this portion of the tax depends is whether the imposition of this tax of one dollar per mile upon every mile of telegraph wire is a tax on property or not. It is admitted that this provision of the Constitution simply restricts the Legislature in imposing taxes on property within the State of Alabama and that it does not curtail the power of the Legislature to levy taxes upon other legitimate subjects of taxation other than property. It is further admitted that no restriction has been placed by the Constitution upon the Legislature upon levying taxes upon franchises of corporations—this distinction having been clearly laid down by the Court of Alabama; but we submit that in this case the Legislature has passed an Act which taxes both the franchise and the property of the Postal Telegraph Cable Company, and that in so far as this is a tax upon the telegraph lines operated by this Company within the State of Alabama, it is a property tax and not being assessed in exact proportion to the value of such property, and being in excess of $\frac{3}{4}$ of 1 per cent. it is in violation of the Article of the Constitution above referred to. The wording of the Act itself shows the intention of the Legislature to exact a privilege tax of five hundred dollars and at the same time lay an additional tax upon the property of the defendant. The Act reads as follows:

"That all express, telegraph and sleeping car companies doing business between points wholly within this State and without reference to the inter-state business shall pay * * a privilege tax of five hundred dollars . . . . . together with one dollar for each mile of telegraph line."

No where has this distinction been more clearly pointed out and more elaborately discussed than in the recent decision of Judge Taft in the case of the Western Union Telegraph Company against Poe, 61st Federal Reporter, page 449, in which it

was held "a tax upon the property of a telegraph company determined in part at least by the aggregate value of the shares of its capital stock, conflicts with a constitutional provision that the taxation of all taxable property shall be " by a uniform rule," because the market value of such stock bears no necessary relation or proportion to the value of the tangible property of the corporation and because it involves elements of value, such as the good will and earning capacity of the business, which are not taxable in the State, and not used therein to determine the value of the taxable property of individuals or other corporations.

In this case the learned Judge points out the distinction between the case of the Western Union Telegraph Company vs. Massachusetts, 125th U. S. 530 and Pullman Palace Car Co. vs. Pennsylvania, 141 U. S., 18 and Express Company vs. Seibert, 142 U. S., 339, and the Ohio case, the distinction being that in the Constitutions of the States of Pennsylvania, Missouri and Massachusetts there is no provision requiring the property of corporations to be assessed and taxed in the same way as property of individuals and quotes the opinion of this Court in the case of Express Company vs. Seibert, 142 U. S. 349, as follows:

"This Court has repeatedly laid down the doctrine that diversity of taxation both with respect to the amount imposed and the various species of property selected either for bearing its burden or for being exempt from them, is not inconsistent with a perfect uniformity and equality of taxation in the proper sense of those terms; and that a system which imposes the same tax upon every species of property, irrespective of its nature or condition or class, will be destructive of the principle of uniformity and equality in taxation, and of a just adaptation of property to its burdens."

"That this is true as an economic principle and that it is equally true in considering the question whether the enforcement of a tax against any property by a State is the denial of the equal protection of the laws secured by the Fourteenth Amendment to the Federal Constitution must, of course, be conceded; but that it is true as Constitutional law in Ohio must be denied. The Constitution of Ohio does impose the same tax on every species of property, as therein defined, according to its true value in money. The constitution of Missouri permitted the classification of property and diversity of taxation on the different classes. The Ohio Constitution does not."

The provisions of the Constitution of the State of Ohio are similar on this question to those of the Constitution of the State of Alabama. Both Constitutions require the property of

corporations to be taxed as the property of individuals and in all the decisions of this Court sustaining a different mode of taxation it will be found that the same was justified under the Constitution of the respective States. It is admitted that if there were no Constitutional inhibition the legislature could levy a different rate of taxation upon various classes of property within the State, and as has been shown in the States of Massachusetts, Missouri and Pennsylvania such a system of taxation is permitted, but in the States of Ohio and Alabama all taxation upon property must be uniform. Now, the State of Alabama has exacted a tax of one dollar per mile upon every mile of telegraph wire operated by defendant within the State, and we submit that this is plainly a tax upon property, for what else can it be considered. It is a specific tax of one dollar per mile upon a specific class of property, viz: telegraph wire. It is not a tax for the privilege of doing business, for that has been already taxed at the rate of five hundred dollars. It is not a tax upon occupation; it is not a tax upon franchise, but it is expressly a tax upon telegraph wire, which constitutes a very large proportion of the property of the defendant company within the State of Alabama.

PROPOSITION 2.

The Act attempts to impose a restriction by way of tax upon the occupation of a foreign corporation engaged in inter-state commerce, and in carrying messages for the Government of the United States, and is therefore unconstitutional and void. This Court has decided in a number of cases that no State can place a restriction in any form upon inter-state commerce, either upon the commerce itself, the business of doing inter-state commerce or the instruments and means employed to carry on such commerce.

Telegraph Company vs. Texas, 105 U. S., 464.
Ratterman vs. Telegraph Co., 127 U. S., 411.
W. U. Telegraph Co. vs Alabama, 132 U. S., 473.
Leloup vs. Port of Mobile, 127 U. S., 640.

Even admitting that this Act taken as a whole is to be construed as a privilege or license tax, it is an attempt on the part of the State of Alabama to accomplish by indirection what the Supreme Court has repeatedly declared to be beyond the power of the State, viz: to tax inter-state commerce. The history of legislation of this kind in almost all the States of the Union has shown a uniform attempt on the part of State Legislatures to impose upon foreign corporations engaged in inter-state com-

merce a tax or license charge for the privilege of transacting such business within its territory. The volume of the inter-state business of such Company being almost always largely in excess of the domestic or internal business of the Company, the States of this Union have for the last one hundred years attempted in one form or another to evade the plain provisions of the National Constitution and to levy a tribute upon the inter-state business of Transportation and Telegraph Companies for the privilege they enjoy in the transaction of their business. As one form of taxation was declared unconstitutional by this Court, the Legislatures of the various States have immediately changed the verbiage of the respective Acts in order, if possible, to evade the principle above referred to, while at the same time accomplishing the same result which the Supreme Court in previous cases has declared to be unconstitutional. No greater illustration of this can be found than in the case of the State of Alabama, the defendant in error.

In 1889, in the case of the Western Union Telegraph Company vs. Alabama, this Court held an Act of the State of Alabama to be unconstitutional which imposed a tax on the gross amounts of the receipts by any and every Telegraph Companies derived from the business done by it in this State, so far as the inter-state business was concerned. In the same year the Legislature of the State of Alabama, recognizing the invalidity of the tax so far as inter-state business of the Company was concerned, passed the Act now brought in question by which it attempts under a different phraseology to accomplish exactly what was sought to be accomplished under the previous Act and what the Supreme Court in Western Union Telegraph Company against Alabama, declared to be unconstitutional. It was decided in that case that the tax, so far as it affected the inter-state business of the Company was constitutional, but the Legislature of the State of Alabama recognizing the fact that the inter-state business of a Telegraph Company amounted to almost nothing in comparison with the inter-state business of the Company and realizing that a tax upon such messages would amount to a very small sum, abandoned the mode of taxation which had received the sanction of the Supreme Court of the United States and passed the present Act, which as we say, is an attempt under the form of words to tax the very business which this Court has decided it should not do. It matters little under what form an Act may be presented, if the effect of the Act is to place a restriction upon inter-state commerce or to interfere with or regulate means of carrying on that commerce; the Court will test the Act by the effect of its operations and not by the words in

which the Act may be framed, and therefore if the Act in question has the effect of imposing restrictions upon inter-state commerce or upon the means employed by the Postal Telegraph Company in conducting such business, this Court will hold said Act to be unconstitutional, *ultra vires* and void, notwithstanding the fact that the Legislature may have sought to disguise its effect by the phraseology of the Act.

Now, what is the Act under consideration? All Telegraph Companies doing business between points wholly within this State and without reference to their inter-state business, shall pay * * * a privilege tax of five hundred dollars—together with one dollar for each mile of telegraph line on or along which the lines of said Company operate or extend."

This is plainly a privilege tax, a tax for the privilege of doing business within the State of Alabama.

"It is a condition upon the performance of which the right to do business depends and to which the right of doing business is referred."

It is a tax on the franchise of the Company which franchise is derived from the State of New York. It is true that the Act says:—upon all Companies doing business between points wholly within the State and without reference to their inter-state business, but these words are merely inserted in the Act with the hope of evading the provisions of the Constitution as interpreted by this Court. If this were a tax upon the business of a telegraph company doing business between points wholly within the State, then the phrase "without reference to their inter-state business," would have a proper application, for then the tax would be upon the business of the Company excepting the business of inter-state commerce. But the Act in question does not impose a tax upon the gross receipts of a telegraph company as was the case in the previous Act, or upon the messages sent over its wires, but it is a tax on the franchise of the Company—a tax for the privilege of transacting its business, a tax on the operations of the Company and as such the words "without reference to its inter-state business," could have no just or proper application, for no reference is made in the Act to the internal or inter-state business of the Company. It is not a tax on business—it is not a tax on messages or gross receipts, but it is an imposition upon the operations of the Company—a license or privilege charge for the right to do business within the State, and under this con-

struction, which we contend to be the only legitimate and proper construction of the Act, the clause without reference to their inter-state business" which was inserted by the Legislature of the State of Alabama, clearly in the hope that it would be a saving clause, cannot save this Act from the decisions of this Court, which has repeatedly laid down the doctrine that no State can levy a charge or tax upon an instrument of inter-state commerce, no matter under what guise the tax may be imposed or in what terms the Act may be phrased. If the effect of the Act is to restrict or regulate an agent of inter-state commerce, no empty words or phrases can save it from the decisions of this Court construing the Constitution of the United States. The franchise of the Postal Telegraph Cable Company is derived from the State of New York, and its operations are carried on by virtue of that franchise and under the Act of Congress known as Section 5263 of the Revised Statutes; as such it is an instrument of inter-state commerce, and an agent for the government of the United States. It is a universally recognized fact, and one of which this Court will take judicial notice, that the great bulk of business done by a telegraph company is inter-state. That its intra-state or local business is comparatively small and only incidental to the true business of the company, which is an instrument of the great inter-state commerce of the world. The franchise of such a company is a franchise to carry on inter-state business, and while it includes the power to transact intra-state business, such business is not the main or principal object of its existence, but only incidental to the other which constitutes its real business. Such a franchise, then, is an entity which is not divisible into a right to transact inter-state business and a right to carry on local business; its right to do business, its privilege of doing business is indivisible, and anything which affects that right affects proportionately all business conducted by such company under such franchise. While it is admitted that a State may tax the real and personal property of a Telegraph Company, may tax the business of such Telegraph Company which is not inter-state business or governmental business, such taxation in nowise affects the company as a whole; it taxes only such property which is legitimate subject of taxation within the State, and has no necessary or natural effect upon the company as a whole or upon its operations, but we contend that any tax laid upon the franchise of an agent of inter-state commerce, no matter under what form such tax may be imposed or in what words the Act authorizing the imposition of the tax may be phrased, is such an interference with inter-state commerce as is prohibited by the Constitution of the United States, and been declared

such by numerous decisions of this Court. As declared by Mr. Justice Bradley in case of Leloup vs. Port of Mobile, 127th U. S., 647. "There are sufficient modes in which the internal business, if not already taxed in some other way, may be subjected to taxation without the imposition of a tax which governs the entire operations of the company."

This is a clear and precise enunciation of the principle for which we are contending. There are sufficient ways in which the State of Alabama may tax the Postal Telegraph Cable Company without imposing a tax which affects its entire operations. It may tax the intra-state business of the Company as decided in Western Union Telegraph Company vs. Alabama. It may tax each intra-state message, which is not on Government business, as decided in the Western Union Telegraph Company vs. Texas. These special systems of taxation have received the approval of this Court and are the only ways which have yet received its approval, in which a Telegraph Company doing inter-state business may be taxed except upon its real and personal property; but in each case as soon as these systems of taxation have been approved by the Supreme Court of the United States, they have been abandoned by the States in which they originated. The internal or local business of the Company is so small in proportion to its inter-state business, that sufficient revenue cannot be derived by the State from such taxation, and so in each case they have sought to accomplish the object, which was always in mind, by a mere change of phraseology. Can a mere change in the verbiage of an Act make that Act constitutional which prior to the change has been declared to be unconstitutional. Can an Act, the effect of whose operations remains the same, by any change of phraseology be made constitutional which before the change has been declared to be in violation of the Constitution of the United States? This very question was presented to this Court in the case of Leloup vs. Port of Mobile, above referred to. In that case the Port of Mobile required a license of $225.00 to be paid by all Telegraph Companies for the privilege of doing business. In that case the Courts say: "Ordinary occupations are taxed in various ways, and in most cases legitimately taxed, but we fail to see how a State can tax a business occupation when it cannot tax the business itself. Of course the exaction of a license tax as a condition of doing any particular business is a tax on the occupation, and a tax on the occupation of doing the business is simply a tax on the business. And again, page 647, "But it is urged that a portion of the Telegraph Company's business is internal to the State of Alabama, and therefore taxable by the State, but that fact does not remove the difficulty. The tax affects the whole

business without discrimination. There are sufficient modes in which the internal business, if not already taxed in some other way, may be subject to taxation without the imposition of a tax which covers the entire operations of the Company." These sufficient modes referred to by Mr. Justice Bradley have been declared by this Court to be a tax upon the gross receipts of messages other than Governmental messages carried exclusively within the State, and second, a specific tax on each such message, but in no case that we have been able to discover has this Court recognized the imposition of a tax directly on the operations of a Company or its franchise. It has been repeatedly decided that a State may impose conditions upon a foreign corporation for the privilege of doing business within its territory, and may exclude them altogether; the only exception being in the case of foreign corporations engaged in inter-state commerce or as agents of the United States, and as to those it has been repeatedly decided that no State can pass any law excluding such companies from its tertory or imposing any restrictions upon its operations.

Mr. Justice Lamar, in Norfolk and Western Railroad vs. Pennsylvania, 136 U. S., 114, says:

"It is well settled by numerous decisions of this Court, that a State cannot, under the guise of a license tax, exclude from its jurisdiction a foreign corporation engaged in its inter-state commerce, or impose any burdens upon such company within its limits."

And in the case of Crutcher vs. Kentucky, 141 U. S., 58, the Court says:

"We have repeatedly decided that a State law is unconstitutional and void which requires a party to take out a license for carrying on inter-state commerce, no matter how specious the pretext may be for imposing it."

And the Chief Justice, in Ling vs. Michigan, 135 U. S., 161, has stated the principle as follows:

"We have repeatedly held, that no State has the right to lay a tax upon inter-state commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that taxation is a burden on that commerce, and

amounts to a regulation of it, which belongs solely to Congress."

We submit, that the Act in question comes plainly within the principles of these decisions. It is a tax laid upon the operations of the company under the "specious pretext" of being a tax on the internal business of the company when the Act itself does not pretend to tax the business of the company in any way, but is distinctly a privilege tax for the right to carry on such business. While the State may tax the business *intra* the State of Alabama, it cannot tax the right to do business, as that right is only incidental to the greater right of the company to transact inter-state business, and this Court, under the decisions above set out, has decided that, no matter what the form or how specious the pretext, if the effect of the Act is to lay a burden upon the operations of inter-state commerce, it would be declared unconstitutional and void.

In Crutcher vs. Kentucky, 141 U. S., page 59, the Court says:

"We do not think that the difficulty is at all obviated by the fact that the Express Company, as incidental to its main business, (which is to carry goods between the different States,) does also some local business by carrying goods from one point to another within the State of Kentucky. This is, probably, quite as much for the accommodation of the people of that State as for the advantage of the company. But whether so or not, it does not obviate the objection that the regulations as to license and capital stock are imposed as conditions on the company's carrying on the business of inter-state commerce, which was manifestly the principal object of its organization. These regulations are clearly a burden and a restriction upon that commerce. Whether intended as such or not they operate as such."

To show conclusively that this Act is an attempt on the part of the State Legislature to accomplish an unconstitutional purpose indirectly, a careful examination of Subdivision 6 of Section 454, of the Code being the Act in question, shows: "That all telegraph companies operating lines within the State of one hundred and fifty miles or over are required to pay a privilege tax of five hundred dollars, whereas all companies whose lines do not exceed one hundred and fifty miles are required to pay annually a tax of one dollar per mile of wire. In other words, the Act is formed so as to make all telegraph companies doing an inter-state business within the State of Alabama pay a privilege tax of five hun-

dred dollars, whereas any telegraph company which is local to the State of Alabama, and whose lines the Legislature of the State of Alabama estimated would not probably exceed one hundred and fifty miles, is only required to pay one dollar for every mile they operate. The Legislature of the State of Alabama, realizing that it could not exact in express words a privilege tax of five hundred dollars from every foreign telegraph company, express company or railroad company within the State for the privilege of doing business within the State has sought to overcome this difficulty by imposing a privilege charge of five hundred dollars upon all companies whose operations extend over a line of one hundred and fifty miles, but exempting any corporation whose operations do not exceed one hundred and fifty miles. While this application may not be clear in reference to telegraph companies, as local telegraph companies are very few in number and rarely to be found, when applied to railroad companies and express companies, its application is at once manifest, for in the State of Alabama there are a number of railroads incorporated by the State of Alabama doing no inter-state business, and whose lines do not exceed one hundred and fifty miles, and it was the clear intention of the Legislature by this Act and in this way avoiding the use of the terms "foreign and domestic," and substituting in their place, "whose lines exceed one hundred and fifty miles," to impose a privilege tax upon foreign corporations for the right to do business within the State of Alabama. This we submit to be the only clear and reasonable interpretation of the Act. It has frequently been decided that in construing an Act it must be construed as a whole, and its intention derived from a proper consideration of all of its parts, and we submit that this is the only theory which gives to each section of this Act a reasonable and proper construction. It has been said that while the intention of an Act must be gained from the Act itself, that considerable assistance may be derived from the study of the history of that class of legislation, and we have shown that after the Act passed upon in the case of Western Union Telegraph Company against Alabama had been decided to be unconstitutional so far as gross receipts on inter-state messages was concerned, the State of Alabama instead of confining itself to the system of taxation which had received the approval of the Supreme Court of the United States, viz: taxation upon local messages, in 1890 sought to enforce this new system of taxation which was intended to put into the State Treasury more than could possibly be derived from taxation simply upon local messages. We say that this taken in connection with the Section of the Act

above referred to shows unmistakably that it is an attempt on the part of the State of Alabama under this specious pretext of taxing business internal to the State of Alabama to levy a contribution upon foreign corporations engaged in inter-state commerce for the privilege of transacting such business within the State of Alabama. Great stress has been laid by counsel for the defendant in error upon the case of Maine vs. Grand Trunk Railway Company, 141 U. S. An examination of this case will show that it was not as it would at first appear from the rubric, the case of a foreign corporation, but that of a domestic corporation incorporated by the State of Maine, and the reason upon which the conclusion of the Court was based in that case was perfectly consistent with the principles here contended for. It is admitted that a State can impose any restrictions it deems best upon the creatures of its own law. It is only in case of foreign corporations that are engaged in inter-state commerce where the restrictions of United States Constitution apply.

The cases of Home Insurance Company against City Council, 93 U. S., 116 and Wiggins Ferry Company against East St. Louis, 107 U. S., 365, have also been relied upon in support of the contention of defendant in error. But in the first case, the Home Insurance Company although a foreign corporation was not engaged in inter-state commerce, and of course it could not avail itself of the privileges conferred upon foreign corporations engaged in inter-state commerce and in the case of Wiggins Ferry Company vs. East St. Louis, while the company was engaged in inter-state commerce the facts show that it was a corporation duly incorporated under the laws of the State of Illinois, and that it was a license fee of the City of East St. Louis, in the State of Illinois, where the Company was residing. We take it that if it had been a license charge of the City of St. Louis or of the State of Missouri, which had been brought in question, the decisions of this Court would have been quite different. No restrictions have been laid by the Constitution of the United States upon States or its municipal corporations in exacting license charges from corporations created under its laws, even though they be engaged in inter-state commerce, but the distinction is first: the company must be a foreign corporation and secondly, it must be engaged in inter-state commerce. If either of these essentials is wanting the rule will not apply. In the case of Maine vs. Grand Trunk Railway and Wiggins Ferry Company vs. East St. Louis, neither of the corporations was a foreign corporation, and in the case of an Insurance Company against City Council the corporation although a foreign corporation was not engaged in inter-state commerce.

The case of the Pacific Express Company against Seibert, 142 U. S., 339, has also been relied upon as announcing a different principle to that contended for here; but that was the case of the tax upon gross receipts of an Express Company within the State, and the Supreme Court of course decided that this did not violate the Constitution of the United States as the business of a foreign corporation done within the State is a legitimate subject of taxation, but as we have before pointed out the tax sought to be imposed in this case is not upon the business of a telegraph company within the State of Alabama, but it is on its operations, on its franchise which is an entirely distinct subject of taxation, for while the tax upon the business of a company may be valid, a tax on its operations which necessarily includes all the business of the company might be unconstitutional as has been expressly decided in Leloup vs. Mobile.

PROPOSITION 3.

The imposition of a tax of one dollar per mile upon every mile of telegraph wire owned by the Postal Cable Co. within the State of Alabama is a tax on an instrument of inter-state commerce and therefore void.

It has been repeatedly decided by the Court that no State has a right to lay a tax on inter-state commerce in any form whether by way of duties laid on the transportation of the subjects of that commerce or on the receipts derived from that transportation or on the business of carrying it on or on the *means* or *instruments* employed to conduct such business. Here we have a specific tax of one dollar per mile levied upon every mile of telegraph wire operated by the defendant company within the State of Alabama, which telegraph wires it is admitted are continuously and interruptedly engaged in the transportation of inter-state as well as intra-state messages and messages for the Government of the United States.

No distinction is made in the Act or can be made; it simply lays a tax of one dollar per mile on every mile of telegraph wire operated by the company within the State of Alabama. The Court has decided that a tax on the occupation is a tax on the business; that a tax on the means of transportation is a tax on the transportation; that a tax on the instrument of inter-state commerce is a tax on inter-state commerce, and therefore we submit that this being a tax on every mile of wire, which wires it is admitted are

continuously and uninterruptedly engaged in the transmission of a vast mass of inter-state business, and in fact, almost exclusively engaged in such business, the intra-state business passing along such wires being inconsiderable and only incidental to the main business of the company which is a great instrument of communication between great commercial centres of the world: that this tax must be considered as a tax levied proportionately upon each message passing along said wires, and that as the vast proportion of such tax must necessarily fall upon the inter-state messages of the company, that said tax is a tax upon such inter-state messages and is unconstitutional and void.

In the case of McCall against California, 136 U. S., 104, which was the case of an Agent McCall stationed in San Francisco for the purpose of soliciting passengers from Chicago to New York, in discussing the nature of the business the Courts say:

"The object and effect of this soliciting agency was to swell the volume of the business of the road: *it was one of the means* by which the Company sought to increase and doubtless did increase its inter-state passenger traffic: it was not incidentally or remotely connected with the business of the road: but it was a direct method of increasing that business. The tax upon it therefore was according to the principles established by the decisions of this Court, a tax upon a means or an occupation of carrying on inter-state commerce pure and simple."

In the case of Pickard vs. Pullman Southern Car Co., 117 U. S., page 34, "An Act of the Legislature of the State of Tennessee imposing a privilege tax of fifty dollars per annum upon every sleeping car run over a railroad in Tennessee was held to be void in so far as it applied to the inter-state transportation of passengers carried over railroads in Tennessee, and the Court held that this tax of fifty dollars per car was really a tax upon the passengers transported in said cars and so far as said tax applied to inter-state passengers carried in said cars, it was unconstitutional and void. And Mr. Justice Blatchford delivering the opinion of the Court says:

"The tax was a unit for the privilege of the transit of the passenger and all its accessories. No distinction was made in the tax between the right of transit, as a branch of commerce between the States, and the sleeping and other conveniences which appertained to a transit in the car. The tax was really one on the right of transit; though laid wholly on the owner

of the car. So, too, the service rendered to the passenger was a unit. The car was equally a vehicle of transit, as if it had been a car owned by the railroad company, and the special conveniences or comforts furnished to the passenger had been furnished by the railroad company itself. As such vehicle of transit, the car, so far as it was engaged in inter-state commerce was not taxable by the State of Tennessee: because the plaintiff had no domicil in Tennessee, and was not subject to its jurisdiction for purposes of taxation: and the cars had no situs within the State for purposes of taxation; and the plaintiff carried on no business within the State, in the sense in which the carrying on of business in a State is taxable by way of license or privilege."

The paralellism between Pickard vs. Pullman Southern Car Co., and the present case is striking. In that case the tax of fifty dollars was levied on each car running on lines in Tennessee. These cars, it is admitted were used both by passengers from points without the State of Tennessee to points within the State of Tennessee,and also by passengers from points wholly within the State of Tennessee. But the Supreme Court decided that this being a tax—a specific tax upon the car—it was a proportionate tax upon each passenger within the car and as the effect of the Act would be to tax inter-state passengers using said cars it was unconstitutional and void. In the present case the State of Alabama has laid a specific tax of one dollar per mile upon every mile of telegraph wire within the State of Alabama. It is admitted that such wires are continuously used for the transmission of inter-state messages and messages for the Government of the United States and also for local messages between points wholly within the State of Alabama. Following the decision of Pickard against Pullman Southern Car Co., this tax of one dollar per mile is proportionately a tax upon every message transmitted over said wires and as the vast bulk of such business is inter-state business, such tax necessarily falls upon such inter-state messages and messages for the Government of the United States and must likewise be declared unconstitutional.

If a Pullman Car is considered a means of inter-state commerce and a tax upon such car is considered to be a tax upon passengers within the car, it follows necessarily that a telegraph wire which it is admitted is used to transmit inter-state messages is an instrument of inter-state commerce, and a tax upon such instrument must be a tax proportionately upon every message transmitted by said wires and therefore a tax

upon all inter-state messages passing on said wires and in consequence the Act so far as it affects inter-state messages and Governmental messages must be considered unconstitutional.

It will be noticed from an examination of the Act that there are no restrictions as to character of business so far as the tax of one dollar per mile of wire is concerned.

In the case of Norfolk and Western Railroad Co., vs. Pennsylvania, it was decided :—

"We pass to the second inquiry above stated, viz :—Was the tax assessed against the Company for keeping an office in Philadelphia for the use of its officers, stockholders, agents and employees, a tax upon the business of the Company ? In other words, was such a tax a tax upon any of *the means* or *instruments* by which the Company was enabled to carry on its business of inter-state commerce? We have no hesitancy in answering that question in the affirmative. What was the purpose of the Company in establishing an office in the City of Philadelphia? Manifestly for the furtherance of its business interests in the matter of its commercial relations."

In McCullough vs. Maryland, 4th Wheaton, page 436, the Courts say :—

"This tax then is a tax on the operation of an instrument employed by the Government of the Union to carry these powers into execution, such a tax must be unconstitutional."

Railroad Company vs. Penniston, 18th Wallace, p. 35.

In discussing the case of Osborn against Bank of the United States, the Court says :—

"The tax therefore was not upon any property of the Bank but upon one of its operations, in fact upon its right to exist as created : it was a direct impediment in the way of a governmental operation performed through the Bank as an agent. It was a very different thing both in its nature and effect, from a tax on the property of the Bank.

* * * * * *

"Such a tax must be unconstitutional. Here is a clear distinction made between a tax upon the property of a Govern-

ment agent and a tax upon the operation of the agent acting for the Government. It is, therefore, manifest that exemption of Federal Agencies from State taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax: that is, upon the question whether the tax does in truth deprive them of the power to serve the Government as they were intended to serve it, or does it hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform. A tax upon their operations is a direct obstruction to the exercise of Federal powers. In this case the tax is laid upon the property of the Railroad Company precisely as was the tax complained of in Thompson vs. Union Pacific. It is not imposed upon the franchises or the right of the Company to exist and perform the functions for which it was brought into being. Nor is it laid upon any act which the Company has been authorized to do. It is not the transmission of dispatches, nor the transportation of United States Mails, or troops, or munitions of war that is taxed, but it is exclusively the real and personal property of the agent, taxed in common with all other property in the State, of a similar character."

The same reasoning which the Court has applied in the case of Governmental Agents, applies with equal force to the plaintiff in error, the Postal Telegraph Cable Company, both as an agent of inter-state commerce and as an agent of the United States Government by virtue of its acceptance of the Act of Congress of 1866.

This identical question has been passed upon by the Court of Appeals of Kentucky, in case of Commonwealth vs. Smith and Commonwealth vs. United States Express Co., 92 Kentucky, page 38. In this case the State of Kentucky sought to recover a license charge from the Western Union Telegraph Company under a revenue law, which required each telegraph company to pay in each year a tax equal to one dollar per mile for the line of poles and first wire and fifty cents per mile for each additional wire.

The rubric of the case is as follows:—

1. No State has the power to impose a tax upon the occupation or business of any person or company engaged in carrying on inter-state commerce.

A Statute of this State requiring Express Companies carrying on business in the State to pay a license tax of five hundred dollars per annum where the distance over which the line of the Company extends in this State is less than one hundred miles and the annual sum of one thousand dollars where the distance is more than one hundred miles, is a regulation of inter-state commerce in so far as it applies to Companies doing business between this State and other States, and is to that extent in violation of the Federal Constitution.

While the State may impose a tax upon property within its borders by a person or Company engaged in carrying on interstate commerce, yet when it is apparent that the tax imposed is a mere arbitrary sum fixed by the State, without regard to the value of the property, it will be regarded as a tax upon the business of the owner, and, therefore such a regulation of interstate commerce as is forbidden by the Federal Constitution.

A tax by the State upon telegraph companies of one dollar per mile for the line of poles and first wire, and fifty cents per mile for each additional wire, is a tax upon the business of the Companies, and therefore, as to Companies doing business between this State and other States, is in violation of the Federal Constitution."

"This corporation has tangible property within the State, and this property, as is conceded, is subject to taxation under its laws, nor is it denied that it does an extensive business within the State as well as out of it, and it is admitted as has been already determined in more than one case, that this company is an agent of inter-state commerce. (Telegraph Co. v. Texas, 105 U. S., 460; Pensacola Telegraph Co. vs Western Union Telegraph Co., 96 U. S., 1.) The lines of this company cross the boundary of the State at Louisville, and all the principal cities bordering on the Ohio River. The penalty for failing to pay this tax, and to which the agent is subjected, is a fine of five hundred dollars. It is contended by the defence that the tax imposed is a mere arbitrary sum fixed by the State without regard to the value of the property owned by the company, or even the income derived from it, and, in addition, that specific taxation is not a tax on property, but must necessarily be a tax on the occupation or business of the person sought to be taxed; while on the other hand, it is claimed that the Legislature must judge whether the tax shall be *ad valorem* or specific and when uniform, it must be held valid.

In this State the power of the Legislature to determine the mode of taxation, and to classify the property to be taxed, is not an open question It may be termed a specific tax as to corporate property, and an *ad valorem* tax as to property that is ordinarily the subject of taxation. A railroad company may be taxed at a certain valuation for each mile, and if termed a specific tax, it is a taxation based on value, or the franchise itself granted by the State may be the subject of taxation without reference to the tangible property it owns. (Cincinnati &c., R. Co. vs. Commonwealth, 81 Ky., 492.)

The right of a State to tax the property of its citizens, when uniformity and equality exist in imposing the burden, can not well be doubted, and if this were the question presented in this case, we would have no difficulty in sustaining the tax. If this is a tax on the property of the corporation within the State, the Statute imposing the burden must be enforced, but if a tax on the business of the corporation, and that corporation an agent of inter-state commerce, it is then an exercise of power belonging to the National Government and must be held invalid. As said by Mr. Justice Strong, in Railroad Co. vs. Penniston, 18 Wall., 5: "It is therefore, manifest, that exemption of Federal agencies from State taxation is dependent not upon the nature of the agent or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax, that is, upon the question whether the tax does in truth deprive them of power to serve the Government as they were intended to serve it, or does it hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform. A tax upon their operations is a direct obstruction to the exercise of Federal power."

"In this case the amount of the taxes alleged to be due the State for the year ending in July, 1888, is $4,024.45, with a fine of $500 for the failure of the corporation or its agent to pay it. It may be difficult to estimate the value of the telegraph poles and the strands of wire necessary to the conduct of the business, but it becomes apparent from the Act itself, connected with the burden imposed on the corporation, that it is its occupation and business that have been taxed without regard to the value of the property it actually owns within the State, and, with the heavy penalty imposed it may directly interfere with the regulation of inter-state commerce and can not be sustained."

Mr. Justice Field, in Gloucester Ferry Co. vs. Pennsylvania, 114 U. S., 196, says: "While it is conceded that the property in a State, belonging to a foreign corporation engaged in foreign or inter-state commerce, may be taxed equally with like property of a domestic corporation engaged in that business, we are clear that a tax or other burden imposed on the property of either corporation because it is used to carry on that commerce, or upon the transportation of persons or property, or for the navigation of public waters over which the transportation is made, is invalid and void as an interference with, and an obstruction of the power of carriers in the regulation of such commerce." And in the case of Le Loup vs. Mobile, reported in 127 U. S., 640, the Court, through Mr. Justice Bradley, says: "The fairest and most just construction of the Constitution leads to the conclusion that no State has a right to lay a tax on inter-state commerce in any form, whether by way of duties laid on the transportation of the subjects of commerce, or upon the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce and amounts to a regulation of it that belongs solely to Congress." There is no limitation to the power within the State to tax, except such as virtually amounts to a confiscation of one's property: but there is not only a limitation, but a prohibition, on the power of the State to impose a tax on the business of corporations or other agencies of inter-state commerce that, in effect, regulates inter-state traffic."

"In both of the cases under consideration, mere arbitrary sums are fixed without reference to value, and evidently, as is to some extent conceded, on the business of each, and whether under the guise of a specific or an *ad valorum* tax, it is manifest that the object and effect of each section of the statute is to impose burdens on the transportation or business of both corporations, and not upon the property within the State. The amount of the tax, and the penalties annexed for enforcing payment, is, in effect, a prohibition of the exercise of the legitimate business of each of the appellees without first complying with the conditions of the statute. In view of the authorities cited, and the mode of enforcing this specific tax, it must be held that the two sections of the statute are in violation of subsection 3 of Section 8, Article I, of Federal Constitution. Judgment affirmed in both cases."

PROPOSITION 4.

In not excepting from the operations of the Act business done for the Government of the United States between points wholly within the State of Alabama the Act in question is unconstitutional.

The two restrictions which have been imposed upon the States in reference to taxation of foreign corporations are, first, they are prohibited from laying a tax upon inter-state commerce in any form, and second, they are prohibited from laying a tax upon business done for the Government of the United States or upon its agents acting as such.

Congress, to facilitate the erection of telegraph lines, has granted to such companies the use of the public domain and post-roads of the United States, and in return for such privilege such companies are required to carry messages for the Government of the United States at rates fixed by the Postmaster General, and to give precedence to business of the company, and as such it has been repeatedly decided they are Governmental agents.

Telegraph Co. vs. Texas, 105 U. S., page 464.

It is admitted in the agreed statement of facts that this company is engaged in carrying messages wholly within the State of Alabama for the Government of the United States, its agents and officers.

The draftsman of the Act of the State of Alabama, while attempting to take the Act out of the operations of the law in reference to inter-state messages, has neglected a most essential clause which should have been worded as follows: "And without reference to business done for the Government of the United States, its agents or officers."

Admitting, for the sake of the argument, the position of the defendant in error as to the construction of this Act, it is a privilege tax imposed upon the telegraph company for the right of doing business between points wholly within the State of Alabama; this necessarily includes all business of whatever kind done by the Telegraph Company between such points, and it is admitted in the case that a part of such business consists of messages sent for the Government of the United States, its agents and officers. The proposition submitted is, that as there is no exception in the Act as to Governmental messages the Act is in effect a tax upon business of the United States Government and a restraint and regulation upon the operations of the officers of the Government in the discharge of their Governmental duty.

While it is universally recognized that the properiy of a Governmental agent situate within the State is subject to taxation as all other property within the State, it has been repeatedly declared that no State can impose a burden upon the business or occupation of such agency it matters not whether such business of such Governmental agent be intrastate or inter-state or partly both. Now, while it may be contended that inter-state Government messages are excluded from the operations of this Act, it must be admitted that no exclusion can be found in the Act as to intrastate Government messages.

The Marshal of the United States District Court for the State of Alabama, has frequent occasion to telegraph to various points within the State of Alabama, on business of the United States Government: such messages are also sent by various other Government officers within the State of Alabama to other officials also within the State of Alabama, and this tax imposes a charge upon the Telegraph Company for the privilege of carrying on such business.

In the case of Telegraph Company vs. Texas, 105 U. S., 464, this question was presented to the Court, and after elaborate argument Chief Justice Waite delivering the opinion of the Court says:

"The Western Union Telegraph Company having accepted the restrictions and obligations of this provision by Congress, occupies in Texas the position of an instrument of foreign and inter-state commerce, and of a Governmental agent for the transmission of messages on public business. Its property in the State is subject to taxation the same as other property, and it may undoubtedly be taxed in a proper way on account of its occupation and its business. The precise question now presented is whether the power to tax its occupation can be exercised by placing a specific tax on each message sent out of the State or sent by public officers on the business of the United States."

"The present case, as it seems to us, comes withint his principle. The tax is the same on every message sent, and because it is sent without regard to the distance carried or the price charged. It is in no respect proportioned according to the business done. If the message is sent the tax must be paid, and the amount determined solely by the class to which it belongs. If it is full rate the tax is one cent, and if less than full rate one-half cent."

"Clearly if a fixed tax for every two thousand pounds of freight carried is a tax on the freight, or for every measured ton of a vessel a tax on tonnage, or for every passenger carried a tax on the passenger, or for the sale of goods a tax on the goods, this must be a tax on the messages. As such so far as it operates on private messages sent out of the State, it is a regulation of foreign and inter-state commerce and beyond the power of the State. That is fully established by the cases already cited. As to the Government messages it is a tax by the State on the means employed by the Government of the United States to execute its constitutional powers, and therefore void. It was so decided in McCulloch v. Maryland, (4 Wheat. 316,) and has never been doubted since."

"It follows that the judgment so far as it includes the tax on messages sent out of the State, or for the Government on public business, is erroneous. The rule that the regulation of commerce which is confined exclusively within the jurisdiction and territory of a State, and does not affect other Nations or States or the Indian Tribes, that is to say, the purely internal commerce of a State belongs exclusively to the State, is as well settled as that the regulation of commerce which does affect other Nations or States or the Indian Tribes, belongs to Congress. Any tax, therefore, which the State may put on messages sent by private parties, and not by the agents of the Government of the United States, from one place to another exclusively within its own jurisdiction, will not be repugnant to the Constitution of the United States."

"As to Government messages, it is a tax by the State on the means employed by the Government of the United States to execute its Constitutional powers, and therefore void. It was so decided in McCulloch vs. Maryland, 4th Wheaton, 316, and has never been doubted since."

An examination of the facts in the case of Telegraph Company vs. Texas, will show that the Supreme Court by unanimous judgment has held that so far as the carrying on of the business of a Telegraph Company as a Govermental Agent, no State can impose any burden upon this, except to require that this property shall be subject to taxation like other property. No distinction has ever been drawn by the Court between Government business, inter or intra-state, and a moment's reflection will show that this is necessarily so. The intra-state business of the United States Government is as equally important to the proper discharge of its functions as the inter-

state. The Telegraph Company under the provisions of Section 5263 of the Revised Statutes, is as much bound to carry and transmit the intra Government business as the inter-state Government business, for if it were otherwise, it would be in the power of the Telegraph Company to refuse to accept the rate fixed annually by the Postmaster-General for Government business, except where the same was inter-state.

The Court has also decided that if there is any possible means provided by the Act by which the Governmental business of the Company may be ascertained, the Act will be upheld as constitutional so far as the intra-state business which is not Governmental is concerned, but in the Act before the Court no such means are provided; it is a single tax upon the entire operations of the Company at a specific sum and necessarily falls as a burden upon every message transmitted by the Company both commercial and governmental.

Judge Bruce on Circuit, while apparently admitting that the tax must necessarily fall upon Government messages, sustained the Act, on the ground that the effect would be inconsiderable. A complete answer to this proposition is found in the decision in the case of McCall vs. California, 136 U. S., 111, in which Justice Lamar, speaking for the Court says:—

"It is farther said that the soliciting of passengers in California for a railroad running from Chicago to New York, if connected with inter-state commerce at all, is so very remotely connected with it, that the hindrance to the business of the plaintiff in error, caused by the tax, could not directly affect the commerce of the road, because his business was not essential to such commerce. The reply to this proposition is, that the essentiality of the business of the plaintiff in error, to the commerce of the road he represented, is not the test as to whether that business was a part of inter-state commerce. It may readily be admitted, without prejudicing his defence, that the road would continue to carry passengers between Chicago and New York, even if the agent had been prohibited altogether from pursuing his business in California. The test is: Was this business a part of the road? Did it assist, or was it carried on with the purpose to assist, in increasing the amount of passenger traffic on the road? If it did, the power to tax it involves the lessening of the commerce of the road to an extent commensurate with the amount of business done by the agent.

Judge Bruce says, at folio 41: "It is true that this may, to

some extent, and in an indirect way, affect the service of the company as a Governmental agency."

The Supreme Court has declared, that the extent of the burden or hindrance placed upon the operations of a Governmental agent or upon inter-state commerce is not a test of the validity of the Act. This is a question of the right of the State to levy this tax. As said by the Court, in Railroad Co. vs. Penniston, 18th Wallace, page 36: "It is therefore manifest that exemption of Federal agencies from State taxation is dependent not upon the nature of the agents or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax, that is, upon the question whether the tax does in truth deprive them of power to serve the Government as they were intended to serve them, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect; it leaves them free to discharge the duties they have undertaken to perform. A tax upon their operations is a direct obstruction to the exercise of Federal power."

Testing this Act by the effect of its operations, which the Court has declared to be the true test, what do we find? If the Court has a right to levy the tax in question, then it has the right to increase the amount of that tax to such an extent as to prohibit altogether the Telegraph Company from doing business between points wholly within the State of Alabama, and it would have to confine itself entirely to inter-state business, for it has repeatedly been decided that the power to tax includes the power to destroy. If the right exists, the extent to which that right shall be exercised lies only in the discretion of the Legislature, so that the effect of such a tax would be to deprive the telegraph company of the right to do any business wholly within the State of Alabama, which would deprive it of its power to transmit messages for the government of the United States between points wholly within the State of Alabama. Viewed in this light, and tested by the effect of its operations if carried to their ultimate extent, it appears at once that the Act is unconstitutional.

A practical illustration of the application of this principle is to be found in the facts connected with the case of the Postal Telegraph Cable Co vs. City Council of Charleston, reported in 56 Federal Reporter, page 419. The Ordinance of 1890 of the City Council of Charleston imposed a license tax of $500 upon all telegraph companies without using the words of exclusion either as to inter-state commerce or governmental agencies. The State Circuit Court held this Ordinance unconstitutional. The next year the Ordinance read: "Not including any business done to or from points without the

State." This was also held unconstitutional, and in the Ordinance of 1892 the provision was as follows: "Telegraph Companies or Agencies each for business done exclusively within the city of Charleston, and not including any business done to or from points without the State, and not including any business done for the Government of the United States, its officers or agents."

Judge Simonton held this Ordinance to be constitutional, as it had excluded from its operations inter state business and Governmental business, which decision has since been affirmed by this Court, in 153 U. S., page 692. In his opinion, Judge Simonton says:

"The draftsman of this Ordinance knew, however, that the business done by these companies between points without this State and the city of Charleston was protected from taxation by the inter-state commerce law," (W. U. Tel. Co. vs. Texas, 105 U. S., 460;) and that in all business done for the Government, its agent was protected from taxation. (W. U. Tel. Co. vs. Alabama State Board of Assessment, 132 U. S., 473.) So this part of the Ordinance carefully excludes any such attempt, "not including any business done to or from points without the State, and not including any business done for the Government of the United States, its officers or agents.

This principle has also been recognized in the case of Western Union Telegraph Company vs. Alabama, 132 U. S., 473, and in this connection we would also call attention to the case of Ex-Parte Conway . . . . . Federal Reporter page . . . . where the same Judge Simonton properly went to the extent of holding that a Telegraph Company being an agent of the Government, a foreman of the Company, its servant engaged in the construction of a telegraph line upon the highways of the State of South Carolina, could not be arrested under the provisions of a State Statute for obstructing the highway but that he was an officer of the Federal Government in the discharge of his duties as such and subject solely to its control and under the authority of Ex-Parte Nagle 135 U. S., page 1. Conway was taken on habeas corpus from the custody of the State Court and his case tried and the defendant dismissed upon the ground that the protection of the Federal Court would be extended to him in the same way in which it is extended to the Telegraph Company its employer.

Considering the case of Western Union Telegraph Co. vs. Texas, 105 U. S., page 460; Postal Telegraph Cable Co. vs.

Charleston, 153 U. S., 692; Western Union Telegraph Co. vs. City Council, 56 Federal Reporter, 419, we submit that it is impossible to resist the conclusion that so far as its inter-state business is concerned as well as its intra-state business the Statute of the State of Alabama not having excluded Governmental business is void. It has been contended on behalf of the defendant in error that the Court will not presume an Act as intended to violate the Constitution of the United States and that it will rather accept such an interpretation of the Act as will render it consistent with such instrument. But this proposition is absolutely refuted by the case of Le Loup vs. Port of Mobile, 127 U. S., 640. In this case the Ordinance of the Port of Mobile imposed a license of $225 upon all Telegraph Companies, and the Court held that in not excepting such business of the Company as the Port of Mobile could not constitutionally tax, the Ordinance was unconstitutional and void, as on its face it was a tax on the entire operations of the Company. Again, in the case of Western Union Telegraph Company vs. Texas, the State of Texas levied a tax upon every message sent by a Telegraph Company and the Supreme Court held that the Act is not excepting on its face inter-state business and business done for the Government of the United States was unconstitutional and void so far as said business was concerned. Again, in the case of Western Union Telegraph Co. vs. City Council, 56 Fed. Rep., 422, Judge Simonton sustained the validity of the Ordinance on the ground that the draftsman of the Ordinance had carefully excepted from its operations such business as the City Council could not constitutionally tax, viz: inter-state business and Governmental business. If the proposition contended for by the defendant in error were true, viz: that the Court will not construe an Act as a burden upon inter-state business or Governmental business unless it expressly appears on its face that it does so, then this Court erred in its decision in the case of Le Loup vs. Port of Mobile, for in that case there was nothing appearing upon the face of the Ordinance to show that it was intended to be a tax upon anything which could not be constitutionally taxed.

The Court has also erred, if this be true, in its decision in the case of Western Union Telegraph Company vs. Texas. The fallacy of the argument lies in the fact that the defendant in error has applied the wrong test as to the constitutionality of the Act. As we have repeatedly shown, the test of the constitutionality of an Act is the effect of its operation, and not the form in which the Act is presented; not the subjects which it purports to tax, not the character of the tax, but the

effect of the Act. If the effect of the Act is to impose a burden upon Governmental business, or upon inter-state business, then the Act is unconstitutional and void. The Court will presume the Act to mean what appears on its face. This Court is not clothed with legislative powers to insert into an Act clauses which would change the whole scope of its operations. The Court found in the case of LeLoup vs. Port of Mobile that the effect of the ordinance was to lay a charge upon inter-state business and Governmental business, and therefore reasoning from these facts it concluded that the ordinance was intended so to operate. The Court found in the case of Western Union Telegraph Company vs. Texas that the effect of the Act was to tax every inter-state and Government message, and the Court was therefore forced to conclude that that was the intent of the Act of the Legislature of Texas. In the State Court of the State of South Carolina in the case before referred to, the State Judge held the Ordinance of the City Council of Charleston to be unconstitutional because it did not except business done for the Government of the United States, and Corporation Counsel in the following year drafted the Ordinance which has just been passed upon by this Court and which we submit is the only form in which an Act of this kind can be drawn excluding expressly both inter-state business and business for the Government of the United States.

TO RECAPITULATE

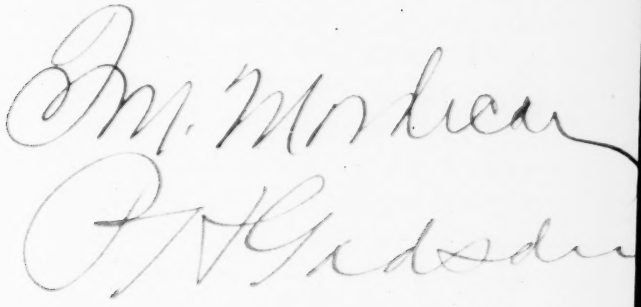
We contend that the Act is unconstitutional on the following grounds:

First. So much of the Act as imposes a tax of one dollar per mile upon every mile of telegraph wire operated by the telegraph company within the State of Alabama is a property tax in excess of $\frac{3}{4}$ of 1 per cent, and therefore in violation of Article 2 of the Constitution of the State of Alabama.

Second. The exaction of a privilege tax of five hundred dollars from this company for the privilege of exercising its franchise within the State of Alabama, is an attempt by indirection to lay a tax upon the operations of a foreign corporation engaged in inter-state commerce, in violation of the Constitution of the United States.

Third. The tax of one dollar per mile upon every mile of telegraph wire is an attempt to impose a burden or a charge upon an instrument of inter-state commerce, and necessarily is a tax proportionately upon all inter-state messages transmitted on said wires, and therefore unconstitutional.

Fourth. In not excepting business done for the Government of the United States, its officers and agents. Said Act is an attempt to impose a tax upon the operations of the Federal Government, and therefore unconstitutional and void.



155-482

402

155-482

Office Supreme Court, U. S.
FILED.
NOV 19 1894
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1894

THE POSTAL TELEGRAPH-CABLE COMPANY *Plaintiff in Error,*

versus

THE STATE OF ALABAMA, *Defendant in Error.*

Brief of WM. L. MARTIN, Attorney-General of Alabama,

FOR DEFENDANT IN ERROR.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

THE POSTAL TELEGRAPH-CABLE COMPANY *Plaintiff in Error,*

versus

THE STATE OF ALABAMA, *Defendant in Error.*

Brief of WM. L. MARTIN, Attorney-General of Alabama,

FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

This suit was brought by the State of Alabama against the Postal Telegraph Cable Company to recover certain statutory penalties alleged to have been incurred by the telegraph company by reason of its failure to pay, for the years 1890, 1891 and 1892, respectively, a privilege tax imposed by an act of the General Assembly of Alabama, approved February 28th, 1889 (Acts 1888-89, p. 89), and which is as follows:

"An Act to amend Sub-division 6 of Section 454 of the Code.

Section 1. *Be it enacted by the General Assembly of Alabama*, That sub-division 6 of section 454 of the Code of 1889, be amended so as to read as follows: That all express and telegraph and sleeping car companies doing business between points wholly within this State, and without reference to their interstate business, shall pay in advance, on the first day of January in each year, to the Auditor of the State of Alabama, a privilege tax of five hundred dollars,

together with one dollar for each mile of telegraph line, or of railroad tracks, on or along which the lines of said companies operate or extend; and no express or telegraph company which has paid the privilege tax hereby required, shall be liable to pay any other privilege or other tax in this State except licenses required by cities and towns, and except upon their real estate, fixtures and other property, which shall be taxed at the same rate as is now levied and collected upon other property in this State; *Provided*, That all express or telegraph companies which have heretofore paid their taxes to the State under existing laws, for the year 1889, are hereby exempt from the provisions of this clause for said year; and, *Provided further*, That all telegraph companies whose lines, on which business is done wholly within the State, do not exceed 150 miles, shall pay at the same time and in the same manner and for the same purpose, a privilege tax at the rate of one dollar a mile for each mile of railroad along or upon which they operate or do business, and no more; and, *Provided further*, That said company, or some agent thereof, shall, when making payment of the tax hereinbefore mentioned, report, under oath, the mileage of railroad operated by them respectively, and in default of the payment of said tax, or the making of said report, for sixty days after the maturity of said tax, a penalty of double the amount of the same shall be imposed on such defaulting companies."

The suit was instituted in a court of the State and upon petition of the telegraph company was removed to the circuit court of the United States for the Middle District of Alabama, where it was tried on an agreed statement of facts, (Record, pp. 25-29).

From the agreed statement of facts it appears that the plaintiff in error is a telegraph company duly incorporated and organized under the laws of the State of New York, and was, during the time covered by the complaint, engaged in carrying on the business of a telegraph company

between points wholly within the State of Alabama, as well as between points within the State and points without the State, and had accepted the provisions of Title 65 of the Revised Statutes of the United States whereby it put its lines at the service of the United States for postal, military and other purposes and in pursuance thereof it had been designated by the Postmaster General as one of the telegraph companies which must send messages for the United States at rates fixed by the Postmaster General. It is further stated in the agreed statement of facts that under article XI of the Constitution of Alabama, all taxes levied on property must be assessed in exact proportion to its value; that the telegraph company is taxed on all of its property in Alabama according to its assessed value as provided by section 504 of the Code of Alabama; that it is subject to laws requiring the payment of licenses to cities and towns for the privilege of doing business therein; that this action is brought out to recover a privilege tax, and is in addition to all other taxes and that the amount will greatly exceed three fourths of one per centum on the value of its taxable property in the State; that there are a large number of miles of wire similar to those of the telegraph company which are used as electrical conductors for telephone and electric lights and electric power purposes within the State and the same are not taxed or assessed or charged by law for privileges in the manner or form or nature or extent as is this telegraph company; that the wires used by the company do not exceed in value the sum of twenty-five dollars per mile and the poles thirty-eight dollars per mile, and that these are the values at which they were assessed for taxation under the general laws of the State. It was also admitted in said statement that the mileage of the company's lines within the State for the time in question was as follows: In 1990, 133.1 miles on railroads; in 1891, 133.1 miles on railroads, 262 miles on county roads; in 1892, 133.1 miles on railroads, 262 miles on county roads. It was also admitted that the company had failed to pay the privilege taxes involved in the action.

The cause being submitted to the court without the intervention of a jury, the District Judge sitting as Circuit Judge held that the act of February 28, 1889, aforesaid was a valid exercise of legislative power in the State and rendered judgment for the aggregate amount of the statutory penalties, that is to say, for double the amount of the tax based on the mileage for each year respectively as agreed on. (Record, p. 29.)

PROPOSITIONS:

I. The question decisive of all questions in the case is this: Has the State of Alabama the right to levy a privilege tax upon a telegraph company doing business between points wholly within the State? The defendant in error insists that this question has been settled in the affirmative by decisions of this court.

Postal Telegraph Cable Co. v. Charleston, 153 U. 692
Western Union Telegraph Co. v. Alabama, 132 U. S. 472.
Ratterman v. Western Union Telegraph Co., 127 U. S. 411.
Telegraph Co. v. Texas, 105 U. S. 460.
Pacific Express Co. v. Seibert, 142 U. S. 339.
Maine v. Grand Trunk Railroad Co., 142 U. S. 217.
Bell's Gap Railroad Co. v. Pennsylvania, 134 U. S., 252.
Lehigh Valley Railroad Co. v. Pennsylvania, 145 U. S., 192, 200.
Munn v. Illinois, 94 U. S. 113, 124.
Gibbons v. Ogden, 9 Wheaton, 1 194-195.

II. A construction will not be put upon a statute which will render it violative of the Constitution and nugatory, if it be capable of a reasonable construction that will give it effect.

Cooley's Const. Lim., pp. 216-218.
Endlich on the Interpretation of Statutes, §§ 178, 179.
Fletcher v. Peck, 6 Cranch, 87, 128.
Ogden v. Saunders, 12 Wheaton, 213, 270.

Grenada County Supervisors v. Brogden, 112 U. S. 261, 268.

South & North Alabama Railroad Co. v. Morris 65 Ala. 193, 197.

Edwards v. Williamson, 70 Ala., 145, 151.

State v. Hartford Fire Ins. Co., 99 Ala. 221, 225.

III. The tax being a privilege or occupation tax, it in no way conflicts with that provision of the Constitution of Alabama which limits the rate of taxation to three-fourths of one per centum on the value of taxable property.

Western Union Telegraph Co. v. Board of Assessment, 80 Ala. 273.

Exparte City Council of Montgomery, 64 Ala. 463.

IV. The State court having judicially settled that the power to raise revenue by the levy of privilege or occupation taxes is not restricted by the State Constitution, this court will not review that question, but will accept the State decision as correct.

Cooley's Const. Lim., pp. 20, 21.

Postal Telegraph Cable Co. v. Charleston, 153 U. S. 692, 694.

In re Lockwood, 154 U. S. 116.

V. The power to levy the tax residing in the legislature, it belongs to that body to determine the methods it will employ in fixing the amount of the tax, and neither the courts of the United States nor of the State of Alabama will inquire into the proper exercise of the power.

Cooley's Const. Lim., 6th Ed., p. 220.

Cooley on Taxation, 2d Ed., pp. 570, 571.

Postal Telegraph Cable Co. v. Charleston, 153 U. S. 692, 699, 700.

Horn Silver Mining Co. v. New York, 143 U. S. 305, 317.

Maine v. Grand Trunk Railroad Co., 142 U. S. 217, 230.

Pacific Express Co. v. Seibert, 142 U. S. 339, 351.

Bell's Gap Railroad Co. v. Pennsylvania, 134 U. S. 232,

McCulloch v. Maryland, 4 Wheaton, 316, 431.

Winter v. City Council of Montgomery, 65 Ala., 403, 413.

One of the grounds on which the plaintiff in error claims that it is not subject to the tax in question, is, that during the years for which the tax is claimed it was engaged in doing an interstate business and in sending messages for the government of the United States. In support of this contention an effort is made to have the act of Febuary 28, 1889, construed to require the payment of the tax for the privilege of doing such interstate and governmental business; and if this construction be not adopted, then the contention seems to be that although the statute may refer only to telegraph companies doing business between points wholly within the State, yet the plaintiff in error having accepted the provisions of the act of July 24, 1866, now Title 65 of the Revised Statutes and as a governmental agent sending messages between points wholly within the State, is brought within the provisions of the act in the discharge of its duties as such governmental agent; that the sending of messages for the government of the United States, between points wholly within the State of Alabama, is doing the business the statute was intended to tax, and hence the statute is void as an attempt to tax a governmental agency.

That no state can impose a specific tax upon interstate commerce or upon an agency of the general government are propositions the truth of which is not controverted; but it is earnestly contended that no just construction of the statute will bring it in conflict with either of these propositions. Nothing but a highly strained construction of the language employed could convict the legislature of an intent to impinge the Constitution. The act was passed after the decisions of this court in the cases of Telegraph Co. v. Texas, 105 U. S. 460, Leloup v. Port of Mobile, 127 U. S. 640, Ratterman v. Western Union Telegraph Co., 127 U. S. 411, and other cases in that line. The principle which pervades all the decisions is that a telegraph company which has accepted the act of Congress of July 24, 1866,

shall not be taxed by authority of the State for any messages sent it for the government of the United States, nor for any interstate messages, but that the State may levy a tax for messages sent between points wholly within the State; that while the regulation of interstate and governmental messages belongs exclusively to Congress, the State possesses the exclusive right to regulate purely internal commerce. It was in the exercise of this right that the legislature of Alabama passed the act on February 28, 1889, by which it levied a privilege tax upon all telegraph companies, express companies and sleeping car companies doing business between points wholly within the State. The act is not susceptible of a construction which would bring its provisions to bear upon interstate or governmental business. It is clear that the legislature intended to deal only with subjects which were within its law making power, to require the payment of a privilege tax for doing, within the limits of the State, the general public business usually engaged in by telegraph, express and sleeping car companies, No one but a hypercritic would take the expression "doing business between points wholly within the State," to refer to the sending of occasional messages for the government of the United States. The contention that the express exception of interstate business and the absence of any such expression as to governmental business shows an intention to include the latter, is not well founded. The expression "without reference to their interstate business," was evidently employed to emphasize the intention to deal only with the purely *intra*-state commerce of the several subjects in hand.

In Fletcher v. Peck, 6 Cranch, 87, 128, Chief Justice Marshall said:

"The question whether a law be void for its repugnancy "to the Constitution, is at all times a question of much deli- "cacy which ought seldom if ever to be decided in the affirm- "ative in a doubtful case. The court, when impelled by "duty to render such a judgment, would be unworthy of its "station, could it be unmindful of the solemn obligations

"which that station imposes. But it is not on slight impli-"cation and vague conjecture that the legislature is to be "pronounced to have transcended its powers, and its acts to "be considered as void. The opposition between the Con-"stition and the law should be such that the judge feels a "clear and strong conviction of their incompatibility with "each other."

"It is but a decent respect due to the wisdom, the integ-"rity, and the patriotism of the legislative body by which "any law is passed, to presume in favor of its validity, until "its violation of the Constitution is proved beyond a reas-"onable doubt." Mr. Justice Washington, in Ogden v. Saunders, 12 Wheat., 213, 270.

In Grenada County Supervisors v. Brogden, 112 U. S., 261, 268, Mr. Justice Harlan, speaking with respect to the constitutionality of a statute of the State of Mississippi, passed in 1871, says:

"It certainly cannot be said that a different construction "is required by the obvious import of the words of the "statute. But if there were room for two constructions, "both equally obvious and reasonable, the courts must, in "deference to the legislature of the State, assume that it "did not overlook the provisions of the Constitution, and "designed the act of 1871 to take effect. Our duty, there-"fore, is to adopt that construction which, without doing "violence to the fair meaning of the words used, brings the "statute in harmony with the provisions of the Constitu-"tion." And such," he remarks, "is the rule recognized "by the Supreme Court of Mississippi, in Marshall v. Grimes, "41 Miss., 27, 31, in which it was said: 'General words in "the act should not be so construed as to give an effect to it "beyond the legislative power, and thereby render the act "unconstitutional. But, if possible, a construction should "be given to it that will render it free from constitutional "objection, and the presumption must be that the legisla-"ture intended to grant such rights as were legitimately "within its power.' Again, in Sykes v. Mayor, 55 Miss., 115,

"143: 'It ought never to be assumed that the law making "department of the government intended to usurp or assume "power prohibited to it. And such construction (if the "words will admit of it) ought to be put on its legislation as "will make it consistent with the supreme law.'"

Mr. Cooley in his work on Constitutional Limitations, 6th edition, page 217, says: "The duty of the court to uphold "a statute when the conflict between it and the Constitution "is not clear, and the implication which must always exist "that no violation has been intended by the legislature, may "require it in some cases, where the meaning of the Consti- "tution is not in doubt, to lean in favor of such a construc- "tion of the statute as might not at first view seem most "obvious and natural. For as a conflict between the statute "and the Constitution is not to be implied, it would seem to "follow, where the meaning of the Constitution is clear, that "the court, if possible, will give the statute such a construc- "tion as will enable it to have effect."

Mr. Endlich in his recent work on the Interpretation of Statutes, discussing this rule of construction, says: "Where "an unconstitutional effect would be the result of a strict "or narrow construction, a broad or liberal one is comanded. " * * * On the other hand, it is a safe and wholesome "rule to adopt the restricted construction of a statute, when "a more liberal one will bring us in conflict with the funda- "mental law."

The principle is fully recognized by the Supreme Court of Alabama, that in pronouncing on the constitutionality of an act which has received the sanction of the legislature, the court will indulge the presumption that such act is constitutional, until clearly convinced to the contrary.

South & North Alabama Railroad Co. v. Morris, 65 Ala., 193, 197.

Edwards v. Williamson, 70 Ala., 145, 151.

State v. Hartford Fire Ins. Co., 99 Ala., 221, 225.

It would be merely by inference or implication from the general words of the statute, if at all, that they could be

supposed to intend to exact a privilege tax of a telegraph company for the sending of governmental messages; an inference or implication which would not only set at defiance a universally recognized rule of statutory construction, but would overturn the obvious and natural meaning of the words of the statute. The contention on the part of the plaintiff in error invites the court to imply a conflict between the statute and the Constitution, in order to strike down the statute. When and where has the legislative or the judicial branch of the government applied the term *commerce* whether interstate or intrastate, to governmental messages? General expressions to designate purely internal commerce with respect to telegraph companies are found in the decisions of this court from the Texas case to the Charleston case. When it was said that the States might tax such commerce, no referance to governmental messages was intended. Such messages stand upon higher ground than commerce of any character.

When the legislature enacted that telegraph companies doing business between points wholly within the State of Alabama, and without reference to their insterstate business should pay a privilege tax to the State, that body used the term "doing business" in its plain and usually accepted meaning, which is business done for individuals and private corporations. For the doing of such business between points within and points without the State, no tax was sought to be imposed, because the regulation of that character of business belonged to the Congress of the United States; but for the doing of such business between points wholly within the State of Alabama, the regulation of which belongs exclusively to the State, the tax was imposed. Thus construed, the statute is in harmony with the Constitution and no right or interest of the general government is touched by it. Its field of operation lies in the domain of powers reserved by the State over its internal concerns.

"When the people of the United Colonies separated from "Great Britain, they changed the form, but not the substance

"of their government. They retained for the purposes of "government all the powers of the British Parliament, and "through their State Constitutions, or other forms of social "compact, undertook to give practical effect to such as they "deemed necessary for the common good and security of life "and property. All the powers which they retained they "committed to their respective States, unless in express "terms or by necessary implication reserved to themselves. "Subsequently, when it was found necessary to establish a "national government for national purposes, a part of the "powers of the States and of the people of the States was "granted to the United States and to the people of the United "States. This grant operated as a further limitation upon "the powers of the States, so that now the governments of "the States possess all the powers of the Parliament of Eng-"land, such as have been delegated to the United States or "reserved by the people. The reservations by the people "are shown in the prohibitions of the constitutions."—Waite, C. J., in Munn v. Illinois, 94 U. S. 113, 124.

"The conflict between the commercial regulations of the "several States was destructive to their harmony and fatal "to their commercial interests abroad, and this was the mis-"chief intended to be obviated by the grant to the Congress "of the power to regulate commerce with foreign nations and "among the States. But, as was said by Chief Justice Mar-"shall, the words of the grant do not embrace that commerce "which is completely internal, which is carried on between "man and man in a State, and which does not extend to nor "affect other States.—Gibbons v. Ogden, 9 Wheat, 1, 189. . . "Taxation is undoubtedly one of the forms of regulation, but "the power of each State to tax its own internal commerce, "and the franchise, property or business of its own corpora-"tions engaged in such commerce, has always been recog-"nized. . . . And while interstate commerce can not be "regulated by a State by the levying of taxes thereon, in any "form, yet whenever the subjects of taxation can be separated "so that that which arises from interstate commerce can be

distinguished from that which arises from commerce wholly "within the State, the distinction will be acted upon by the "courts, and the State permitted to collect that arising from "commerce solely within its own territory.—Ratterman v. "Western Union Telegraph Co., 127 U. S. 411, 424."—Fuller, C. J., in Lehigh Valley Railroad v. Pennsylvania, 145 U. S. 192, 200.

It can not matter that the commerce carried on wholly within the State is intimately connected with that which relates to other States or foreign countries, as by being conducted by the same persons or corporations and over the same lines and under the same management. So long as the subjects of taxation can be separated and that which relates to domestic commerce can be distinguished from that which relates to interstate commerce, the State will not be deprived of its revenue on business carried on solely within its own territory. If the business of the telegraph company in Alabama was confined to interstate commerce and the sending of messages for the government of the United States, then it would not come within the provisions of the statute, and would not be subject to the tax thereby imposed; but when, in addition to its interstate and governmental business, it engages in the business of sending messages between points wholly within the State of Alabama, such business is purely internal commerce, the regulation of which has not been delegated to the Congress of the United States but is reserved to the State, and is as fully and completely within the taxing power of the State as it would be if it constituted the sole and only business of the telegraph company. The act of engaging in a business which is beyond the taxing power of the State can not confer the right to tack on another and a distinct business which is clearly within the taxing power of the State. The reasons for the exemption of interstate and governmental business from State taxation are well understood. They are not the same in each case. In the one, the reason for the exemption is, that the regulation of interstate commerce belongs exclusively to Congress; in

the other, it is because of a principle which goes to the integrity of the government itself. The rule ceases in each case when the reason of it ceases. The taxation by the State of a business which is purely internal invades no province of the Congress and affects no function of the government of the United States.

Let us suppose that Congress in the exercise of its power to regulate interstate commerce should see proper to impose a privilege or occupation tax upon telegraph companies engaged in such commerce, and that a telegraph company when sued for the tax should say in defense that although it was in fact engaged in interstate commerce, it was engaged also in intrastate business which Congress had no power to tax, that the supposed tax affected its entire business, both interstate and intrastate, and was therefore unconstitutional. It is clear that such defense would be without merit. Yet wherein would it differ in principle from the defense here attempted to be based on the interstate commerce clause of the Constitution? The right of Congress to regulate interstate commerce stands upon no higher ground, is no more absolute, unqualified and exclusive, than the right of the State to regulate its own internal commerce—no discrimination being made by the State against citizens or products of other States. If the State can not exercise its right to tax the internal business of a concern, which is engaged also in interstate commerce, then the Congress would seem to be equally powerless to tax the interstate commerce of a concern which was engaged also in intrastate business. Within their respective spheres the State and Federal governments are alike supreme.

The right of a State to levy a privilege or occupation tax upon the internal business of telegraph companies similarly situated to the plaintiff in error has been directly or impliedly sustained by the decisions of this court in the cases of Telegraph Co. v. Texas, 105 U. S. 460; Ratterman v. Western Union Telegraph Co., 127 U. S. 411; Leloup v. Port of Mobile, 127 U. S. 640; Western Union Telegraph Co. v. Ala-

bama, 132 U. S. 472, and Postal Telegraph Cable Co. v. Charleston, 153 U. S. 692. In the last cited case the other cases are reviewed and applied as establishing the proposition here contended for.

In the case of Leloup v. Port of Mobile, the ordinance imposing the license tax placed it "on telegraph companies," without any discrimination as to interstate commerce. To the suggestion that a portion of the telegraph company's business was internal to the State of Alabama, the court replied: "But that fact does not relieve the difficulty. This tax affects the whole business without discrimination. There are sufficient modes in which the internal business, if not already taxed in some other way, may be subjected to taxation without the imposition of a tax which covers the entire operations of the company."

The statute here in question relieves all difficulty. It is directed solely to and bears only upon business internal to the State.

In Telegraph Company v. Texas, it was held that the State law, so far as it imposed a specific tax on each message transmitted beyond the State, or which an officer of the United States might send on public business, was unconstitutional, but that any tax which the State might see proper to put upon internal messages would not be repugnant to the Constitution of the United States; and the statute to this extent was sustained.

In Ratterman v. Western Union Telegraph Co., and in Western Union Telegraph Co. v. Alabama, it was held that a tax on the business of the telegraph company, measured by a given per centum on its gross receipts, was valid so far as it applied to receipts derived from commerce entirely within the limits of the State.

In Postal Telegraph Cable Co. v. Charleston, 153 U. S. 692, it was held that an ordinance of the city of Charleston, adopted in pursuance of authority conferred by the legislature of that State, which levied a license tax of five hundred dollars on each telegraph company "for business done exclusively

within the city of Charleston, and not including any business done to or from points without the State, and not including any business done for the government of the United States, its officers or agents," was valid. To the suggestion of hardship which would result to the company if license exactions were allowed to and made by the various cities in the State, the court replied: "But this is a hardship, if such exists, that it is not within our power to redress. If business done wholly within a State is within the taxing power of the State, the courts of the United States can not review or correct the action of the State in the exercise of that power."

It was further contended in that case, that the ruling of former cases did not cover the case of a telegraph company which has constructed its lines along the post roads of the city of Charleston, and elsewhere, and which is exercising its functions under the act of Congress as an agency of the government of the United States. In respect to this contention the court said:

"It is obvious that the advantages or privileges that are "conferred upon the company by the act of July 24, 1866, "(Rev. Stat. §§ 5263-5268) are in the line of authority to "construct and maintain its lines as a means or instrument "of interstate commerce, and are not necessarily inconsis- "tent with a right on the part of the State in which business "is done and property acquired to tax the same, within the "limitations pointed out in the cases heretofore cited."

The tax in question being a privilege or occupation tax and not a tax levied upon property, it is not repugnant to that provision of the State Constitution which limits the rate of taxation to three-fourths of one per centum on the value of taxable property within the State. Such is the construction placed upon the Constitution by the Supreme Court of Alabama.—Western Union Telegraph Co. v. Board of Assessment, 80 Ala. 272; Ex parte City Council of Montgomery, 64 Ala. 463.

The courts of the United States will not, therefore, review

the question but will accept the State decision as correct and will follow it.—Cooley's Const. Lim. pp. 20, 21; Postal Telegraph Cable Co. v. Charleston, 153 U. S. 692, 694; In re Lockwood, 154 U. S. 116.

Mr. Cooley in his work on Taxation lays down the doctrine that the State may, in the discretion of the legislature, levy a tax on every species of property within its jurisdiction, or, on the other hand, that it may select any particular species of property, and tax that only, if in the opinion of the legislature that course would be the wiser. "And what is true of property is true of privileges and occupations also; the State may tax all, or it may select for taxation certain classes and leave the others untaxed. . . . The methods in which business shall be taxed are also in the legislative discretion. The taxes which are most customary are: 1. On the privilege of carrying on the business. 2. On the amount of business done. 3. On the gross profits of the business. 4. On the net profits or profits divided. But the tax may be measured by other standards prescribed for the purpose as well as by these."—Cooley on Taxation, pp. 570, 571.

The Fourteenth Amendment, that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. "If that were its proper constructin it would not only supersede all those constitutional provisions and laws of some of the States whose object is to secure equality of taxation, and which are usually accompanied with qualifications deemed material; but it would render nugatory those discriminations which the best interests of society require; which are necessary for the encouragement of needed and useful industries, and the discouragement of intemperance and vice, and which every State, in one form or another, deems it expedient to adopt."—Bell's Gap Railroad Co. v. Pennsylvania, 134 U. S. 232, 237.

That telephone and electric light wires and conductors "are not taxed or assessed or charged by law for privileges in the manner or form or nature or extent" that telegraph companies are charged for privileges, is no defense to this action. All telegraph companies are charged alike, and that is believed to be sufficient.

It may be observed, however, that while telephone and electric light companies are not taxed for privileges by the method of measurement applied to telegraph, express and sleeping car companies, it by no means follows that they are not taxed for privileges. By reference to section 454 of the Code of Alabama, 1886, it will be seen that in addition to the tax levied upon property, a tax of one per cent upon the gross income of a large number of occupations is levied; and among them we find enumerated electric light companies. (Subd. 5.) And by reference to the acts of the legislature of Alabama, 1892-3, p. 866, it will be seen that telephone companies are taxed one per cent on their gross receipts. A tax on gross receipts is not a tax on property within the meaning of the State Constitution, but is a privilege or occupation tax.—Western Union Telegraph Co. v. Board of Assessment, 80 Ala 273; 132 U. S. 472.

The proposition that the plaintiff in error "being subject to laws of the State which require the annual payment of specific license fees and charges in cities and towns for the privilege of doing its business therein, in addition to a tax upon its property, said act of the General Assembly of Alabama is unconstitutional, *ultra vires* and void," is self-repugnant and falls of its own weight. The stream can not rise above its source. The State is the fountain of all authority in municipal corporations, including the power to tax.

Cooley on Taxation, 2nd ed., p. 178;
City of Mobile v. Roberts, 98 Ala. 594.

The statute makes no discrimination between telegraph companies. It provides that all express and telegraph and sleeping car companies "doing business between points

wholly within this State, and without reference to their interstate business," shall pay "a privilege tax of five hundred dollars, together with one dollar for each mile of telegraph line or of railroad tracks, on or along which the lines of said companies operate or extend." The lines here referred to are those within the jurisdiction of the State; the lines upon which the business that is taxed is done. As to telegraph lines, they need not run along railroads; they measure their own length. The reference to railroad tracks applies to express and sleeping car companies, their business being done upon railroad lines. The general act applies to all telegraph companies doing business of internal commerce, whether their lines are confined to State limits or extend to other States. Such is clearly its meaning.

But it seems to be objected that the second proviso limits the operation of the whole statute to telegraph lines which run along and are used in connection with railroads; or, that it discriminates between companies engaged in interstate commerce and those which are not. The proposition is so palpably without merit that it needs but to be stated to be rejected. The office of a proviso is to take special cases out of the general act and to provide for them. The special cases taken out of the general act by the proviso here in question, are: "All telegraph companies whose lines on which business is done wholly within the State do not exceed 150 miles." The provision made for them is that they "shall pay, at the same time and in the same manner and for the same purpose, a privilege tax at the rate of one dollar a mile for each mile of railroad along which they operate or do business and no more." If this provision by its letter applies only to lines along railroad tracks, all lines are clearly within its spirit, and it should be construed to include all lines within the State which do not exceed one hundred and fifty miles and which are employed in doing business local to the State.

If, however, the proviso shall be held to apply only to telegraph lines which run along railroads, then all other

lines are left under the provisions of the general act; and since the lines of the plaintiff in error amounted, in 1890, to less than 150 miles within the State, and since those miles were along railroads, it is difficult to see how the plaintiff in error is injuriously affected when it is taxed at the rate of one dollar per mile only; while, according to the seeming contention, a small line not upon any railroad would have to pay the additional sum of five hundred dollars. A party can not be heard to complain of a statute that it discriminates against others than himself. He will not be permitted to take upon himself the burden of litigating the rights, real or supposed, of strangers to the suit.

Respectfully submitted,

WILLIAM L. MARTIN,
Attorney-General of Alabama.